88-912

Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VANESSA REDGRAVE

Petitioner,

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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November 29, 1988

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VANESSA REDGRAVE,

Petitioner,

—VS.—

BOSTON SYMPHONY ORCHESTRA, INC.,

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QUESTIONS PRESENTED

1. Did the Court of Appeals abdicate its federal judicial responsibility, violate *Michigan v. Long*, 463 U.S. 1032 (1983), and otherwise err when the Court of Appeals refused to decide an unavoidable federal constitutional issue and instead held that this case had been decided for it, in respondent's favor, on grounds of state constitutional law, solely on the basis of dicta contained in the state court's answers to questions of law certified to the state court by the Court of Appeals, when those certified questions presented only issues of statutory construction, the state court answered the certified questions of statutory construction in petitioner's favor, the state court did not decide any state constitutional question, and the state court certainly did not give a plain statement of any independent state constitutional ground for decision?

2. May a federal court properly rely, in part, upon language found in a state court minority opinion, dissenting from a state court's answers to the federal court's certified questions, where the majority of the state court, in its answers to the certified questions, rejects the conclusion of the dissent?

3. Were the petitioner's rights further violated when the federal court entered judgment against petitioner in this federal case, based upon the dicta in the state court's answers to the

certified questions, without any consideration by the federal court, or by the state court, of the crucial issue of how the law as supposedly set forth in the state court's dicta applied to the facts in the trial record?

4. Did the courts below err in concluding, without any analysis, that a state civil rights statute, requiring employers not to interfere with the free speech rights of individuals, was unconstitutional, as applied to a performing arts organization's termination of a contract employee because of her political views, on the ground that the performing arts organization has a constitutional "artistic integrity" right to perform, or not to perform, as it sees fit?

PARTIES TO THE PROCEEDING

Petitioner Vanessa Redgrave was appellant in the court below. Vanessa Redgrave Enterprises Ltd. also was an appellant in the court below, but only as to the contract claim, which is not before this Court. Respondent Boston Symphony Orchestra, Inc. was the appellee-cross appellant in the court below.

RULE 28.4(C) STATEMENT

28 U.S. § 2403(b) may be applicable. No court below certified to the State Attorney General the fact that the constitutionality of a state statute was drawn in question. The Massachusetts Attorney General submitted an *amicus curiae* brief supporting Redgrave to the Massachusetts Supreme Judicial Court, but that brief addressed only the issues of statutory construction that were certified by the Court of Appeals to the Massachusetts Supreme Judicial Court.

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Petitioner Vanessa Redgrave respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this proceeding on August 31, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit, sitting *en banc*, and reversing the Court of Appeals' prior panel decision, is reported at 855 F.2d 888 (1st Cir. 1988), and is reprinted in the appendix hereto at pages 1a-67a. The judgment entered below is reprinted at page 68a of the appendix. The First Circuit's Order denying rehearing is reprinted at pages 70a-71a of the appendix. The opinion of the First Circuit panel, which was later reversed by the First Circuit *en banc*, is reprinted at pages 72a-108a of the appendix. The opinion of the Massachusetts Supreme Judicial Court, answering the two questions of statutory construction certified by the First Circuit panel, is reported at 399 Mass. 93, 502 N.E.2d 1375 (1987), and is reprinted at pages 109a-126a of the appendix. The opinion of the District Court is reported at 602 F.Supp. 1189 (D. Mass. 1985), and is reprinted at pages 129a-181a of the appendix.

JURISDICTION

The decision of the Court of Appeals for the First Circuit, *en banc*, was filed August 31, 1988. Petitioner duly moved for rehearing, and that motion was denied on September 20, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved, which are the First Amendment, its equivalent provision in the Massachusetts Declaration of Rights, and Sections 11H and I of Chapter 12 of the Massachusetts General Laws, are reprinted at pages 127a-128a of the appendix.

STATEMENT OF THE CASE

The decision below holds in effect that a significant new state civil rights statute, designed to provide a remedy for interfer-

ence by private parties with the exercise of constitutional rights, is itself unconstitutional, at least as applied to a performing arts organization's dismissal of a contract employee because of her political views, because of the existence of a novel "artistic integrity" free speech defense to civil rights liability. That serious result—serious both in terms of its effect on the new civil rights statute and in its unprecedented extension of constitutional law—was reached below without any analysis of constitutional law and on the basis of what the court below conceded was mere dicta.

On appeal after trial, the Court of Appeals for the First Circuit certified to the Massachusetts Supreme Judicial Court ("MSJC") two questions concerning the meaning of the new Massachusetts civil rights statute upon which plaintiff-petitioner Vanessa Redgrave had sued defendant-respondent Boston Symphony Orchestra ("BSO"). The MSJC, answering the certified questions, resolved every issue concerning the meaning of that State statute in Redgrave's favor. Applying that State law to the facts of the case, a panel of the Court of Appeals for the First Circuit then held that BSO was liable to Redgrave under that statute. The First Circuit panel rejected a novel First Amendment defense of "artistic integrity."

Then, on rehearing *en banc*, a bare 3-2 majority of the *en banc* Court of Appeals seized upon tentative dicta in the MSJC's answers to the certified questions, concerning the "artistic integrity" free speech defense—an issue of constitutional law *not* certified to the MSJC. Relying on that dicta by the MSJC, finding an independent state ground where none was given, and declining to decide the constitutional issue for itself, the Court of Appeals *en banc* majority proceeded to reverse the prior panel decision and to enter judgment in favor of BSO. Thus was judgment entered below in favor of BSO, on a novel constitutional defense that no court has ever truly ruled on.

This case therefore presents for review two distinct, significant issues—one procedural and one substantive—each of which is worthy of grant of certiorari.

1. The procedural issue concerns the proper use of the device whereby federal courts may certify issues of state law for decision by state courts. This Court should caution lower courts

against using certification as it was used here—as an excuse for evading constitutional questions that cannot properly be evaded, in violation of Redgrave's rights and in violation of *Michigan v. Long*, 463 U.S. 1032 (1983).

In the harsh but accurate words of the *en banc* dissent below, the *en banc* majority sought to avoid deciding the constitutional issue presented by "manipulating" the MSJC's answers to the certified questions. (A 57a).[1] The *en banc* majority sought to justify its reliance on the State court's dicta, and its wholesale abdication of the judicial function, as follows (A 27a):

> In the absence of a definitive ruling by the highest state court, a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand,' taking into account the broad policies and trends so evinced.

But there is a vast difference between relying on state court dicta in an effort to divine the meaning of a state statute, on the one hand, and, on the other hand, relying on state court dicta to decide an issue of constitutional law. And that difference becomes essential where, as here, (a) the state court has long held that the state's constitutional law of free speech is coextensive with the First Amendment and (b) the state court's dicta contains no suggestion that the two sets of constitutional law diverge. The *en banc* dissenters rightly complained that this avoidance of decision-making was "comity run amok" and "a mockery of the certification process." (A 44a; 58a).

2. The substantive issue presented is whether there exists a so-called "artistic integrity" constitutional bar to a state legislature's attempt to establish a new remedy for what this Court has characterized as political coercion.

In a free society, people's livelihoods should not depend upon their holding "correct" political views, as defined either by their government or by their employer. This Court has recognized that where a state dismisses an employee in retaliation

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1 References to "A _____" are to the separately-bound appendix to this petition.

for that employee's political views, federal law provides a remedy for such "political coercion." *Branti v. Finkel*, 445 U.S. 507, 517 (1980).

This case concerns political coercion in the private sector—behavior that, forty years ago, was commonly known as blacklisting. Forty years ago, some of the most able people in this country lost their livelihoods because their employers decided to prove their own political "purity" by firing and refusing employment to people identified in some manner with communist, socialist or liberal politics. *See, e.g.*, K. Foley, *The Political Blacklist in the Broadcast Industry* at 422 (1979). And although many lives were ruined in the process, few victims of that political coercion sought redress in the courts, and those who did were turned away. *See* Comment, "Political Blacklisting in the Motion Picture Industry," 74 *Yale L.J.* 567, 567-69 (1965).

The State of Massachusetts in 1979 enacted a broad new civil rights statute, called the Massachusetts Civil Rights Act ("MCRA"), that provides a remedy for, among other things, such blacklisting. It was the peculiar genius of the MCRA—the state statute upon which Redgrave relies—to extend to the private sector the kind of protection for basic political rights that this Court recognized, in *Branti v. Finkel*, 445 U.S. 507 (1980), applies to state action.[2] The courts below agreed that the MCRA provides a remedy to victims of such political coercion by a private defendant even if the defendant acted in acquiescence to third-party pressure. (A 25a-26a; 114a-117a).

The substantive issue presented, therefore, is no more and no less than whether the State of Massachusetts (or any other legislative body) has the power to enact a statutory remedy against blacklisting or whether, on the other hand, there is a First Amendment bar to a statute that attempts to create such a remedy.

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2 The MCRA provides for a private right of action against "any person or persons, whether or not acting under color of law, [who] interfere by threats, intimidation or coercion," or attempts to interfere by threats, intimidation or coercion, "with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the [constitution or laws of the] commonwealth." Mass. Gen. Laws Ann. Ch. 12, § 11H (1984), *id.* § 11I.

This statement of the substantive issue is no mere rhetoric. Redgrave proved at trial that BSO terminated her employment solely because she had expressed (nowhere near BSO's stage) a political view unpopular in some circles, namely, that the Palestinian people should have a homeland of their own. As the dissenters to the First Circuit *en banc* decision below stated (A 63a):

> The only possible conclusion to be drawn from this record [*i.e.*, the trial record] and from the findings of the district court is that the BSO cancelled its contract with Redgrave in acquiescence to pressure from persons who disagreed with her political views and who, therefore, sought to retaliate against her . . . . The BSO, by doing so, effectively has blacklisted Redgrave.

Yet the First Circuit, sitting *en banc* and voting 3-2, has now held, albeit by default and indirection, by deferring to the MSJC's dicta on this subject, that there is a constitutional exception to this new and significant statutory liability—a defense of "artistic integrity." According to the "decision" below, a performing arts organization is constitutionally immune from such liability, evidently on the theory that a performing arts organization may perform, or not, as it sees fit, and need not conform even to such a speech content-neutral, and societally important, regulation as the MCRA.

That "holding" should be reviewed by this Court because it constitutes an unprecedented expansion of the First Amendment that has undermined a significant new piece of State civil rights legislation that itself was designed to protect First Amendment rights. As the *en banc* dissenters pointed out (A 66a), the result reached below is "nightmarish."

Statement of Facts

In March 1982, BSO hired Redgrave, a renowned actress, to perform as the narrator of BSO's production of Stravinsky's opera-oratorio "Oedipus Rex." (2035a-2039a).[3] On Monday, March 29, promptly after the news media reported Redgrave's

3 References to (_____ a) are to the Joint Appendix in the court below.

engagement, Irving Rabb, a BSO Trustee, called BSO General Manager Thomas Morris and asked whether BSO had in fact hired Redgrave, and if so, if BSO could "get out of it." (377a-378a; 381a; 383a). In Rabb's view, Redgrave was "very anti-Israel" and "a supporter of the PLO." (379a; 383a).

Morris confirmed to Rabb that BSO had hired Redgrave. (384a). Rabb told Morris that "there's a great deal of anger about this in the Jewish community." (428a). The Boston B'nai B'rith Anti-Defamation League was to meet in the next few days to decide whether publicly to censure BSO for hiring Redgrave. (182a). Rabb and Morris then had the following exchange (384a):

> I [Rabb] said, 'Is there any way you can get out of this contract? I think you will offend a tremendous number of Jews in the community if she performs.'

Morris replied: "Give me an hour or two, let me get some more information, and I will call you back." (384a).

Immediately after speaking with Rabb, Morris called a meeting of his staff and reported that Rabb was trying to stem opposition and prevent Jewish organizations from issuing a statement critical of BSO. (183a). Morris described the problem as one of fund raising and public relations. (185a-186a; 688a). Morris suggested getting a substitute for Redgrave as narrator. (186a).

After the meeting, Morris called Rabb. In the interim, Rabb had called the Anti-Defamation League and left word that Rabb "had called the [BSO] management and was trying to see if they could cancel the contract," and that no statement critical of BSO should be issued. (387a). Rabb and Morris agreed that Redgrave's contract should be cancelled, and Morris told Rabb that Morris was working on it. (388a-390a; 394a). Morris remarked that the worst thing that could happen would be for public statements to be made censuring BSO. (598a-599a).

Morris then turned to the task of going forward with the "Oedipus Rex" concerts without Redgrave and masking the reason for dumping her. At a meeting Monday afternoon, Morris asked BSO stage director Peter Sellars if Sellars would stage

the performances without Redgrave as narrator. (187a).[4] Sellars replied that he would like to think it over. (189a-190a). Morris also discussed changing narrators with the president of the BSO Trustees (483a-485a), and with BSO Press Office staff at a dinner meeting. (601a).

When Sellars returned to Symphony Hall later Monday night, Morris told Sellars that "Oedipus Rex" could not proceed with Redgrave as narrator. (204a). Sellars then told Morris his own thinking (192a-194a; 200a):

> I explained . . . that . . . the act of removing Ms. Redgrave from the performances . . . was fully the equivalent of in 1933, because of a certain political climate, saying at the Vienna State Opera, let's not have a Jewish person sing the role of Siegfried. It was a form of blacklisting. It was denying the right to work of a given artist because of their political points of view. . . . I said that I felt it [would] se[t] an extremely dangerous, dangerous precedent. . . . If artistic decisions began to be made not because of artistic qualifications but because of political qualifications, then we are into a situation that could be accurately described as blacklisting.

Morris replied it was Morris's decision to make and that, in his view, it was impossible to proceed with Redgrave. (198a; 203a-204a; 333a).

On Tuesday, March 30, Morris ordered Redgrave's name deleted from the advertising for the concerts. (211a; 607a). Morris again told Sellars that "Oedipus Rex" could not proceed with Redgrave. (214a). That same day, Morris and BSO Press Office personnel began drafting a press release announcing that Redgrave would not appear in the "Oedipus Rex" performances. (268a-269a).[5]

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4 BSO had hired Peter Sellars, an eminent director, MacArthur Prize winner, and later the artistic director of the American National Theatre of the Kennedy Center for the Performing Arts in Washington, D.C., to serve as Stage Director of the "Oedipus Rex" performances. (150a; 159a-160a).

5 Also on Tuesday, March 30 Morris began to suggest that if the concerts were to proceed with Redgrave, various things could happen, ranging

Late Tuesday afternoon, Morris reported, in a written memorandum to the Chairman of the BSO Trustees, that BSO had received no threats, except for possible picketing that BSO admitted would not have disturbed the performances. (608a; 2032a; 1564a). Morris also reported: "The sentiments of the Jewish [sic] are without question stronger than we had anticipated." (2032a).

On Wednesday, March 31, Sellars refused to go forward without Redgrave, and Morris decided to cancel the "Oedipus Rex" program. (239a-242a).

On Thursday, April 1, BSO issued a press release that tracked the *force majeur* clause in Redgrave's contract and stated that the cancellation was "due to causes and circumstances beyond [BSO's] reasonable control." (252a; 2042a). Although BSO argued to the jury that BSO's conduct was excusable,[6] the jury

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from picketing to audience disruption. (218a). Morris began to "search for the public safety problems that would impede the performance [if Redgrave appeared]." (*Id.*). Morris' attempt to invent an excuse included communications with an official at Carnegie Hall, and with the Boston Police Department, in which he asked for a guarantee that there would be no disruption (611a-615a)—a guarantee that no one could give for any live performance, as Morris admitted at trial. (621a). Morris told the Police Commissioner that Morris "was getting some pressure from the Jewish community not to allow her to go on." (1745a-1746a). Morris and the Police Commissioner discussed Morris's "fantasies" of what might happen. (1735a). The Police Commissioner said he "would give him everything we had that would insure public safety" (1751a), that he could assure public safety (1755a), but that he could not "guarantee" that there would be no disruption. (1755a). Morris also fed disinformation to BSO Musical Director Seiji Ozawa. Without any basis for saying so (610a), Morris told Ozawa that Redgrave might talk back to the audience from the stage. (529a). Morris also told him that people had threatened to boo Redgrave (548a)—when no such threat was ever made or received, and Redgrave had never once been booed during any artistic performance. (721a).

6 BSO argued that the performance would have been disrupted, but no threats to disrupt the performance were ever made. Before cancelling, BSO received nothing more than four mild protest letters (2045a-2050a) and some telephone calls in which subscribers expressed their disagreement with BSO's decision to hire Redgrave and, at most, threatened to withhold contributions or picket the performance. (1383a-1380a; 1709a-1711a). One member of BSO's Press Office told the unlikely story that a Mr. Arthur Bernstein had called BSO, identified himself as a leader of the Jewish Defense League, gave his telephone number, and threatened that there would be violence if the con-

found otherwise, returning a verdict in Redgrave's favor on the contract claim, which is not before this Court.

The Proceedings Below

Redgrave sued BSO in federal court, relying on diversity jurisdiction, for breach of contract and for violation of the MCRA.

At trial, the parties differed on the meaning of the MCRA. BSO contended that BSO could be liable under MCRA only if BSO fired Redgrave because BSO itself objected to her politics. Redgrave contended that BSO could be liable if BSO terminated her in acquiescence to political opposition by BSO's clientele.

The United States District Court for the District of Massachusetts instructed the jury (which, with regard to this civil rights claim, was sitting only in an advisory capacity) that BSO could be held liable under MCRA only if BSO fired Redgrave because BSO itself disagreed with her political views.

The jury returned a verdict for BSO on the MCRA claim. But, ten days later, the entire jury spontaneously wrote to the trial judge:

> We [*i.e.*, the jurors] were convinced that there was indeed an abrogation of Redgrave's civil rights by the BSO. We were convinced that one of the primary reasons that the BSO cancelled the arrangements for Vanessa Redgrave to appear as narrator in the performances of Oedipus Rex, was that the agent(s) who acted for the BSO in making the decision to cancel were willing to cooperate

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certs went ahead with Miss Redgrave. (1664a-1665a; 1600a). This account—that someone would call, give his name and number and threaten violence—is on its face hard to credit. Bernstein himself testified that all he did when he called BSO was to inform BSO that he would picket. (1325a-1326a; 1331a-1333a). In any event, Bernstein's call came days after BSO decided (in Morris' words) to "throw [Redgrave] overboard" (188a)—and came even after the cancellation was publicly announced. (1387a-1388a; 1639a-1643a). Morris admitted he knew nothing of the call until after the cancellation was announced. (648a). Clearly, the Bernstein call was a red herring. Also, not one of BSO's musicians refused to play, and a member of BSO's management admitted that the musicians had nothing to do with the cancellation. (1759a-1766a).

> with members of the broader Symphony community (*i.e.* season subscribers, ticket holders, and supporters of monetary contributions) in the desire by members of that broader community to fire Ms. Redgrave because, and only because, of the disagreement of that group with political views that Redgrave had publicly expressed.
>
> The group expressed its demands in terms of politics and money—disagreement with Redgrave's politics and threats, expressed or implied, to withhold money. The BSO agent(s) knew this to be so. They knew further, that to accede, to these demands was to violate Ms. Redgrave's civil rights . . . We thought [this] was clearly proved by a preponderance of the evidence [but] we could find no way to express [it] within the confines of the verdict questions and your [*i.e.*, the court's] explanation to us as to the parameters within which the law required we must decide. (2129a).

In its findings of fact, the trial court found that BSO did not terminate Redgrave because BSO itself opposed her politics. (A 181a-182a). Given the trial court's narrow reading of the MCRA, that narrow finding was sufficient to dispose of the case, so the trial court made no other finding about the reasons for the termination.[7]

On appeal, after oral argument, the First Circuit panel certified to the MSJC two novel questions of statutory interpretation upon which the First Circuit wanted guidance. The two certified questions were as follows:

> 1. Under the Massachusetts Civil Right Act, Mass. Gen. Laws Ann. Ch. 12, § 11H and § 11I, may a defendant be held liable for interfering with the rights of another person, by, 'threats, intimidation, or coercion,' if the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights?

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7 The trial court made *no* finding as to whether or not BSO terminated Redgrave in acquiescence to Redgrave's political opponents. Instead, the trial court wrote (emphasis added): "*Even if it in fact occurred*, such acquiescence [does not violate the statute]." (A 184a). The trial court therefore did not rule out such acquiescence.

2. If a defendant can be held liable under the Massachusetts Civil Rights Act for acquiescence to third party pressure, is it a defense for the defendant to show that its actions were independently motivated by additional concerns, such as the threat of extensive economic loss, physical safety, or particular concerns affecting the defendant's course of business?

In January 1987, the MSJC answered both certified questions in Redgrave's favor. The MSJC answered the first certified question in the affirmative, and the MSJC answered the second certified question in the negative. (A 25a-26a; A 113a-117a).

In so holding, the MSJC issued three separate opinions. A plurality opinion joined by three of the MSJC's seven judges (A 109a-117a), and a concurring opinion joined by two more MSJC judges (A 117a-118a), answered the statutory questions in Redgrave's favor. A dissent, representing the views of the two remaining MSJC judges, would have resolved the statutory questions in BSO's favor. (A 118a-126a).

The three MSJC opinions contained dicta concerning an issue of constitutional law *not* certified to the MSJC. The plurality opinion contained dicta that plainly was meant to raise issues for subsequent consideration by the Court of Appeals.[8] As the

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8 The MSJC plurality wrote (A 112a-113a emphasis added): "We answer the two certified questions in accordance with their clear and unequivocal wording. *In doing so, we express no opinion on some serious issues which are not addressed in the questions but which are suggested by the record of the case. It can be inferred* from the record that the BSO was itself a victim of violations of G.L.c. 12, § 11H, by those persons who put pressure on the BSO to cancel the Redgrave participation. *From the premise* that the BSO had the free speech right to perform or not as it saw fit, *it can be argued* that the BSO's secured rights were interfered with, and that it was not within the legislative intent that anyone should be punished under c. 12 for exercising the constitutional right not to speak (i.e., perform). *It can also be argued* that when a private person decides not to speak and has no duty to do so, it would be unconstitutional to require that person to speak or, contractual obligations aside, to punish him civilly for not speaking. . . . *We have not considered any of the above arguments or issues in answering the two certified questions.* We treat the questions as addressed to a typical action under the Massachusetts Civil Rights Act, which does not concern a defendant who is exercising a free speech or other constitutional right in interfering with the secured rights of another. *In short, we answer the two questions as they are worded.*"

en banc dissenters below pointed out (A 50a; emphasis in original):

> These comments [in the MSJC plurality opinion concerning the constitutional issue] are pure hypothetical conjecture and equivocation. They do not even rise to the level of dicta because they are not statements of *opinion* regarding issues not before the court. They are merely recitations of arguments that might be made (concerning issues not before the court), without any indication whether the justices in the plurality indeed thought that the arguments were valid.

The plurality opinion made no reference to Massachusetts constitutional law.

The dissenting two MSJC judges briefly referred to constitutional law: To buttress the dissent's construction of the MCRA—that there could be no liability unless BSO terminated Redgrave because BSO itself was opposed to her political views—the two dissenting judges invoked the rule that statutes be construed "to avoid . . . constitutional difficulties . . ." (A 122a).

These comments cannot properly be read to recognize a constitutional defense. In the trenchant words of the *en banc* dissent below: "When the [MSJC] dissent said it [would] construe the MCRA to avoid constitutional questions, it was doing precisely that: *avoiding* the constitutional question, not deciding it." (A 51a; emphasis in original). The MSJC dissenting opinion also contained no reference to Massachusetts constitutional law.

In the concurring opinion, the MSJC's two remaining judges stated their agreement with the plurality's answers to the certified questions of statutory construction. The two concurring judges then went on to speculate that "perhaps the Court of Appeals intended to insulate us from consideration of constitutional issues." (A 117a-118a). The two concurring judges continued their speculations as follows, *id.*:

> I have been unable to think of any theory under which, in the circumstances, statutory liability may properly be imposed on the BSO in the face of its State constitutional

> right to determine what artistic performances it will or will not perform. Redgrave's constitutional rights are no greater than those of the BSO, and there was no way in which the interests of each could be accommodated.

These comments, on an issue not before the MSJC, could not properly be relied upon as stating an independent state ground for deciding this case *even if* the comments had been adopted by a majority of the MSJC (which they were not). As the *en banc* dissent pointed out: "In invoking the Massachusetts Declaration of Rights, the concurring justices expressed no intent to depart from the established rule that state free speech rights are identical to and based on federal rights. Their opinion, therefore, does not provide 'independent grounds,' as required by *Long*." (A 56a).[9]

The First Circuit panel issued its decision on October 14, 1987, splitting 2-1. The majority, consisting of Circuit Judges Bownes and Selya, held that, given the MSJC's answers to the certified questions, BSO was liable under the MCRA. (A 94a-97a). The panel majority rejected as a matter of law BSO's argument that BSO had a First Amendment "artistic integrity" defense to liability under MCRA. (A 97a-101a). The panel remanded for the limited purpose of damage assessment. (A 100a-101a).

Judge Coffin dissented, on the ground that, in his view, BSO had a First Amendment defense. (A 101a; 104a). Significantly, Judge Coffin did *not* contend in his panel dissent that the

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9 As BSO itself acknowledged in its briefs to the Court of Appeals, the MSJC has repeatedly held that the right of free speech under the Massachusetts Declaration of Rights is co-extensive with free speech rights under the First Amendment. *Langone v. Secretary of the Commonwealth*, 388 Mass. 185, 446 N.E.2d 43, 50 (1983) ("Plaintiffs. . . advance no separate reasons, and we are unaware of any, to conclude that the Massachusetts Constitution affords them protection not provided by the First and Fourteenth Amendments of the United States Constitution"); *Opinions of the Justices to the House of Representatives*, 387 Mass. 1201, 1202, 440 N.E.2d 1159, 1160 (1983); *Colo v. Treasurer and Receiver General*, 378 Mass. 550, 558, 392 N.E.2d 1195, 1200 (1979); *First National Bank of Boston v. Attorney General*, 371 Mass. 773, 359 N.E.2d 1262 (1977).

MSJC had already answered the constitutional issue on State constitutional grounds.[10]

Months later, however, after the First Circuit agreed to hear the case *en banc*, Judge Coffin did an about-face. Writing now for a bare *en banc* majority of three, Judge Coffin turned the MSJC's speculative dicta into a holding on constitutional law. And although a few months before Judge Coffin saw no alternative to reaching the First Amendment issue, now he wrote for the *en banc* majority: "We decline to reach the federal constitutional issues . . . ." because now he found that the MSJC had decided the case in favor of BSO on independent State grounds. (A 43a). On that rationale, and *without deciding for itself any issue of law bearing on the MCRA claim*, but instead deferring to what the *en banc* majority conceded to be mere dicta (A 27a), the *en banc* majority entered judgment against Redgrave. (A 43a).

Judge Bownes and Selya's *en banc* dissent was harshly critical of the *en banc* majority opinion (A 44a):

> The majority's reading of the SJC's opinions is ill-founded and wholly unconvincing. It ignores the clear and unequivocal answers to the two questions certified to the SJC, relying instead on dicta in the SJC plurality opinion, it unduly emphasizes the concurring opinion by two justices, and it engrafts onto the plurality and concurring opinions selected statements from the dissent. Then, to hold this pastiche together, it overrules . . . well-established Massachusetts law holding that, as far as freedom of speech is concerned, state and federal rights are coextensive. Not only has the majority ignored the dictates of *Michigan v. Long*, 463 U.S. 1032 (1983), it has rewritten Massachusetts law. This is comity run amok.

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10 BSO itself conceded that the MSJC had not decided the constitutional issue. Thus, in support of its application to the First Circuit panel for permission to submit additional briefs to the First Circuit panel, BSO stated (emphasis added):

> In its response to this Court's certification of questions in this appeal, the Supreme Judicial Court *raised and left open* a number of issues of constitutional dimension now before this Court in the pending appeal.

The *en banc* dissent pointed out that a majority of the MSJC, in its answers to the certified questions, rejected the statutory defenses offered by BSO; that the MSJC had expressly declined to decide any issue of constitutional law; that there was no statement of an independent state ground sufficient to satisfy this Court's decision in *Michigan v. Long*, 463 U.S. 1032 (1983); that the State's interest in the MCRA was weighty;[11] that the BSO's claimed constitutional defense was vague, unprecedented and unlimited;[12] that BSO had, of its own free choice, decided to perform "Oedipus Rex" and to engage Redgrave to perform in it; and that, under this Court's prior decisions, including *Board of Directors of Rotary Int'l v. Rotary Club*, 107 S.Ct. 1940 (1987), any incidental effect on BSO's interests was insufficient to render the MRCA unconstitutional. (A 44a-66a).

The dissenters also pointed out "the potentially nightmarish consequences of recognizing" the constitutional right that BSO contended for. (A 66a). Here, as elsewhere, the *en banc* dissent was eloquent (A 66a-67a):

> If the first amendment extends absolute protection to the BSO when it fired Redgrave in response to public outcry over her political views, why would it not also protect the BSO in caving in to public views about her sex, her race, or her religion? If, in another case, the BSO refused to hire a Black performer because it felt that protests by bigots would be so intense as to compromise the BSO's 'artistic integrity,' then the Black performer should have a cause of action under the MCRA against the BSO for infringing her rights under the equal protection clause and any analogous state constitutional provisions banning race discrimination. But the 'artistic integrity' defense would impose a

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11 The dissenters below wrote: "The effect of the MCRA in this case is to further the Commonwealth's interest in preventing the abridgement of speech. There can be no denying that this interest is substantial. Political speech, like the pro-PLO speech for which Redgrave has been made to suffer, is a particularly valuable and protected commodity." (A 59a).

12 The dissenters below wrote: "Under the rubric of 'artistic integrity,' the BSO [w]ould insulate itself from any but the most superficial legal scrutiny." (A 64a).

fatal barrier to the application of the MCRA. And there is no reason to assume that the same defense would not also extend to other institutions, such as newspapers and universities, that engage generally in first amendment activity.

REASONS FOR GRANTING THE WRIT

I

THE CERTIFICATION PROCESS MUST NOT UNDERMINE BASIC PRINCIPLES OF FEDERALISM, INCLUDING THE FEDERAL COURTS' DUTY TO DECIDE CONSTITUTIONAL ISSUES THAT PROPERLY MAY NOT BE AVOIDED

If properly applied, certification can be "a promising tool for obviating some of the great difficulties which result when a federal court attempts to interpret a state statute which has never been interpreted by the highest court of the state."[13] In this case, however, the State court answered the certified questions and resolved all the issues of statutory construction in favor of Redgrave. All that remained was the constitutional defense proffered by BSO. Given the co-extensiveness of pertinent federal and State constitutional law, the Court of Appeals erred profoundly when it ignored the dictates of *Michigan v. Long* and failed to decide the constitutional issue presented.

This error in the use of the certification process, together with the other errors discussed below, is worthy of this Court's attention. Today, at least 36 states have enacted certification statutes or rules.[14]

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13 Remarks by Chief Justice Rehnquist at the January 27, 1988 Meeting of the National Conference of Chief Justices, Williamsburg, Va., at 15, as quoted in "Inter-Jurisdictional Certification And Choice of Law," 41 *Vanderbilt Law Review*, 411 at 413, note 1 (April 1988). *See Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974); *Bellotti* v. *Baird*, 428 U.S. 132 (1976).

14 Committee on Federal Courts, "Analysis of State Laws Providing for Certification By Federal Courts of Determinative Issues of State Law," 42 *Rec. A.B. City N.Y.* 101, 126-153 (1987).

A. Deciding a Federal Case on Constitutional Grounds on the Basis of State Court Dicta Containing No Independent State Ground

The *en banc* dissent was highly critical of the decision below for "flout[ing] the compelling logic and binding precedent of *Long*." (A 56a). *Long* requires a plain statement of an independent state ground for decision.

Because there was nothing at all in the MSJC's decision that could support a finding of an independent State ground for decision of the constitutional issue, the *en banc* majority went *outside* the four corners of the MSJC's answers in search of a distinction between the Massachusetts constitutional law of free speech and the First Amendment. To support the proposition that such a distinction exists, the *en banc* majority cited a law review article by one of the MSJC justices and three prior MSJC cases, none of which was cited in the MSJC's answers to the certified questions. (A 41a).

Even if it were proper to employ such extra-decisional sources for this purpose, the *en banc* majority's analysis does not bear scrutiny. The few authorities cited by the *en banc* majority are not on point. Of the three cases cited by the *en banc* majority, one, *Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985), concerns search and seizure rights and has nothing to do with freedom of speech. The other two, *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978), and *Cabaret Enterprises Inc. v. Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 468 N.E.2d 612 (1984), concern nude dancing in places where alcohol is served, and both those cases distinguished State law from federal law on the ground that Massachusetts does not have a constitutional provision analogous to the Twenty-First Amendment, and not because there is some distinction between Massachusetts and federal free speech rights. The law review article, meanwhile, actually shows that there is *no* distinction between constitutional protection of free speech under Massachusetts constitutional law, on the one hand, and under the First Amendment, on the other hand.[15]

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15 With regard to the law review article written by one of the MSJC justices, the *en banc* dissent wrote as follows (A 53a-54a):

> Justice Wilkins' article discusses generally the relationship between the United States Constitution and the Massachusetts Declaration of

Turning to *Michigan v. Long* itself, the *en banc* majority emphasized that the MSJC's answers to the certified questions cited no federal cases on the constitutional issue and that there was "no appearance" that the MSJC was referring to federal law on this issue. (A 42a). Ignoring the fact that the three MSJC opinions also cited no State cases on the free speech issue presented, spoke vaguely of "constitutional law," and (except for the concurrence) did not even mention the State Constitution, the *en banc* majority wrote (A 42a):

> We think it clear, that the concurrence did rely on 'adequate and independent state grounds,' and we are confident that at least a majority of the SJC would join that position.

The *en banc* dissent pointed out that this Court held in *Long* that there can be no independent state ground if a state court opinion is ambiguous as to the source of its constitutional ruling. (A 55a).[16] The *en banc* majority erred by ignoring

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Rights and, among other things, it explores "the *future prospects* for construing [the Massachusetts free speech guarantees] as divergent from the First Amendment." *Supra* at 58 (emphasis added). . . . The principle that Massachusetts and federal speech rights are coextensive is a firmly established one, noted in many opinions of the SJC. *See, e.g.*, cases cited *supra* at 75. It has never seriously been questioned in any SJC opinion. This principle leads to the inescapable presumption that whenever the SJC rules on the state constitutional right to free speech, it is also ruling on the first amendment. The extrajudicial commentary of a single justice does not alter this presumption. If anything, Justice Wilkins' law review article demonstrates a familiarity with past SJC practice such that if he had wanted to depart from the established rule, he would have done so explicitly.

16 Thus, this Court stated in *Long*, 463 U.S. at 1040-42 (emphases added): "When . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is *not clear from the face of the opinion*, we will accept as the most reasonable explanation that the state court decided the way it did because it believed that federal law required it to do so . . . . *If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds*, we, of course, will not undertake to review the decision . . . . [A]mbiguous or obscure adjudications by state courts [must] not stand as

the "presumption" that this Court established in *Long*, 463 U.S. at 1043, n.8: There is no independent state ground unless a state court opinion plainly states one.

The *en banc* dissent then applied the rule of *Michigan v. Long* to what little the MSJC actually did say about the constitutional issue in its answers to the certified questions (A 55a-56a):

> [N]either the SJC plurality opinion nor the dissent can fairly be read to have decided or opined on any constitutional issue. However, even assuming that all three opinions suggested a constitutional ruling, *none* satisfies the *Long* plain statement test and *none*, therefore, justifies the majority's evasion of the federal constitutional issues raised. With respect to the plurality and the dissent, this court's majority opinion itself notes that neither "distinguished between possible state and federal sources." *Supra* at 57. To the extent those opinions have any constitutional dimension, they are precisely the kind of "opaque" state court rulings that Long was intended to address. *See supra* at 60.
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> The majority attempts to over-come this facial violation of the plain statement rule through its "confidence" that

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barriers to a determination by this Court of the validity under the federal constitution of state action . . . . [We will] assume that there are no such grounds when it is *not clear from the opinion itself* that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." *Accord Delaware v. Van Arsdall*, 475 U.S. 673, 678 n.3 (1986) ("The opinion of the Delaware Supreme Court . . . lacks the requisite, plain statement, that it rests on state grounds"); *New York v. P.J. Video, Inc.*, 475 U.S. 868, 873 n.4 (1986) ("We conclude, in the absence of a 'plain statement' to the contrary, that the decision of the Court of Appeals was premised on federal, not state law"); *Caldwell v. Mississippi*, 472 U.S. 320, 327 (1985) ("An examination of the decision below reveals that it contains no clear or express indication that a separate, adequate and, independent state-law grounds were the basis for the court's judgment"); *Ohio v. Johnson*, 467 U.S. 493, 498 n.7 (1984) ("A review of the court's syllabus indicates that the court did not articulate an independent state-law ground for the decision"); *Florida v. Meyers*, 466 U.S. 380, 382 n. (1984) ("This is hardly a clear indication that the [state court's] ruling provided an independent and adequate basis for reversal of the conviction").

> the plurality and dissenting justices "would" decide this case on state constitutional grounds if that issue were presented to them. *Supra* at 60. Speculation about what the SJC "would" decide does not, however, a plain statement make, and without a plain statement that the justices intended to rely independently on the Massachusetts Constitution, we *must*, under *Long*, assume that the justices were relying on the federal Constitution.
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> The opinion of the two concurring justices [,meanwhile,] expressed no intent to depart from the established rule that state free speech rights are identical to and based on federal rights. Their opinion, therefore, does not provide "independent grounds" as required by *Long*.
>
> Overall, the majority has read between the lines of the SJC's three opinions, ferreted out a constitutional ruling where none was intended, and then blindly deferred to that ruling in the complete absence of any plain statement of adequate and independent state grounds.

The rule of *Michigan v. Long*, violated below, in fact deserved particular respect in this case. That rule has even greater significance in this case than it had in *Michigan v. Long* itself, for three reasons:

1. The *Michigan v. Long* rule arose in a case brought in a state court, where the state court based its ruling on a constitutional ground. That rule, requiring a plain statement of an independent state ground, grows in importance when applied to a federal court's use of a state court's answers to questions certified by the federal court. For federal courts should not be asking the state courts to do what that the federal courts themselves are obligated to do—namely, to decide questions of federal law.

Federal courts should decide issues of federal law not only because federal courts have greater experience with and knowledge of federal law. Federal courts should also be deciding issues of federal law because parties, including the petitioner in this case, have a right to be in federal court and to have their cases decided by federal judges who are appointed for life and are shielded from political forces. These considerations are particularly strong in the case at bar, in which a foreign plaintiff,

relying on the federal diversity statute, comes to federal court to sue a major cultural institution in the State of Massachusetts, and in which political passions are central.

2. In *Michigan v. Long*, the State court had clearly decided the constitutional issue presented. Here, on the other hand, as the *en banc* majority expressly acknowledged (A 27a), the State court language upon which the *en banc* majority relied below was mere dicta. The *en banc* majority nevertheless decided that it was proper to rely upon that language as dispositive because the *en banc* majority said it was confident that the State court would hold that there was a constitutional defense if that issue had squarely been put to the State court. (A 27a).[17]

The tentative language in the State court's answers cannot possibly bear that weight. But regardless of precisely what weight the MSJC intended its tentative language to have, surely constitutional law should not be fashioned by state court dicta that contain no plain statement of any independent state ground. To do so is to base our most precious freedoms on little more than sand—which is precisely the nature of the decision below.

3. The decision below threatens federal rights. The MCRA in this case represents a remedy for interference with Redgrave's exercise of her First Amendment rights. The decision below barred access to that remedy. Therefore, the criticism that Justice Stevens has leveled at the *Michigan v. Long* presumption has no application here. *See Long*, 463 U.S. at 1068-69 (dissenting opinion).

B. Deciding a Federal Case by Relying on a State Court Dissent

Because neither the plurality MSJC opinion nor the concurring MSJC opinion contained any independent state ground,

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17 The *en banc* majority sought to bolster its position by referring to the need for a state court to be able to reshape a certified question. (A 28a). But the MSJC never reshaped the questions certified, never asked for argument on any reshaped questions and never answered any reshaped questions. Rather, the MSJC answered only the questions that were certified and expressly stated that it was *not* going beyond the confines of the certified questions. *See*, A 49a, quoted above at page 11, note 8.

the Court of Appeals could not properly defer to what was said in those opinions about constitutional law. And because those two opinions represented the views of five of the seven MSJC justices, and those two opinions said nothing at all helpful to BSO on any statutory issue, the case could not possibly be decided in BSO's favor on state law grounds consistent with *Michigan v. Long*.[18]

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18 The *en banc* majority went so far as to speculate that the five MSJC plurality and concurring justices would have agreed with the two dissenters and would have disposed of the case on state statutory grounds if the right question of statutory construction had been certified to the MSJC. (A 38a). The *en banc* majority engaged in this unsupportable speculation even though the plurality and the concurring MSJC opinions resolved all statutory issues in Redgrave's favor, and even though the MSJC dissent was just that—a dissent. This unacceptable speculation by the *en banc* majority was based on a snippet at the end of the MSJC dissenting opinion, where the dissenters had identified an additional possible statutory defense for BSO that was not encompassed by the certified questions, and that had never been argued by the BSO, namely, that "merely" cancelling the performance did not constitute a "threat, intimidation or coercion" within the meaning of the MCRA. (A 126a). The *en banc* dissent spoke persuasively about the *en banc* majority's misuse of this language in the MSJC dissent (A 51a-52a; emphasis in original):

> Importantly, this argument was not articulated by any party to this case nor was it addressed in any fashion by either the plurality or the concurring justices of the SJC. It was simply a suggested theory, virtually an aside, presented in the last paragraph of the dissent. At that, the dissenting justices noted only that it was "doubtful" that the BSO's action amounted to "interference with secured rights by threats, intimidation or coercion." 399 Mass. at 110, 502 N.E.2d at 1385 (O'Connor, J., dissenting).
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> Nevertheless, the majority speculates that there "would" be "unanimity" [on the MSJC] on this theory. *Supra* at 54. The majority identifies no precedent of the SJC that supports such speculation. It merely points out that the SJC, like all courts, normally construes statutes so as to avoid constitutional difficulties and also notes that "none of the other justices rejected" the dissent's "novel" statutory argument. *Id.* I think it obvious that this important issue of statutory construction cannot stand on such a flimsy foundation. To begin with, I can ascribe no significance to the fact that the plurality and concurring justices failed to reject this argument given that no party ever raised the issue and it was not even the basis for the dissent. More fundamentally, I think

Nevertheless, the *en banc* majority attempted to buttress its decision—that the MSJC had decided the case on State law grounds—by relying upon what the MSJC's two dissenting justices had to say about the meaning of the statute. The *en banc* majority's reasoning was simple:

> There are at least four votes on the SJC for denying liability on state law grounds. The concurring [two] justices would establish a state constitutional defense, and the [two] dissenters would interpret the statute, in light of constitutional concerns, to prohibit liability in the first instance . . . [I]t is [therefore] unnecessary and improper for us to reach the federal constitutional issues. (A 38a).

Wholly aside from the concurring opinion's failure to state an independent state ground (which therefore means the concurrence may *not* be relied upon in this manner), the *en banc* majority's reasoning is profoundly flawed. It ignores the proper role of the federal courts, and it confuses this case, properly brought in federal court, with a case brought and decided solely in state court. The *en banc* dissent spoke persuasively to this point (A 48a):

> The central state law issues in this case are the two questions of statutory interpretation we certified to the SJC. On those questions, we have received clear answers from a majority of five justices. That two justices disagreed with the majority's analysis should have no bearing on our handling of this case, for their view, however interesting it may be, failed to carry the day in the SJC. Certainly we

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that the majority's facile interpretation of the statute is absolutely untenable as applied to the facts of this case. The BSO did not "merely" cancel a performance, it cancelled an employment contract with Redgrave—essentially fired her—on the basis of community reaction to her political beliefs. In so doing, the BSO substantially undermined Redgrave's ability to obtain other work, as evidenced by the fact that this court has affirmed an award to Redgrave of $12,000 in consequential contract damages . . . . Even if they do not amount to "threats" or "intimidation," I fail to see how the BSO's actions, affecting Redgrave's fundamental right to work, can be characterized as other than "coercive" within the meaning of the MCRA.

have no business combining the two dissenting votes with the votes of the two concurring justices, who based their position on entirely different grounds and indeed explicitly rejected the dissent's analysis. In its eagerness to "defer" to the SJC, the majority of this court has confused the procedure of certifying questions of state law to a state court with the procedure of certifying entire cases to state courts. Federal courts do not certify cases to state courts. They certify questions of law and then apply the answers to those questions to reach a result which represents the combined effect of majority, not minority, positions.

General application of the majority's head-counting approach would produce equally inconsistent and anomalous results in other cases. In deciding cases involving multiple issues of Massachusetts law, federal courts in this circuit would be free to comb the volumes of Massachusetts Reports until they found sufficient dissenting votes from different justices on some combination of issues to produce a "majority." Hypothesizing that the case actually arose in state court, the federal court could then apply its constructed "majority" of dissents even though its resulting decision ran counter to the result that would be produced if the court applied the majority position on each issue. Such a situation obviously would be intolerable.

C. Abdicating the Critical Judicial Function of Applying Law to Fact

The mangling of the certification procedure that occurred below violated Redgrave's most basic due process right—the right to have a court apply the applicable law to the facts before judgment is entered against her.

One searches in vain through the *en banc* majority opinion below for any attempt to apply the law, as supposedly given in the MSJC's dicta, to the trial record in this case. Instead, the Court of Appeals simply deferred to the MSJC's dicta, as if that dicta had decided the case.

The MSJC, meanwhile, made no attempt to apply law to fact—no doubt because it was not the function of the MSJC to decide this case, or to apply the law to the facts, but only to answer the questions that had been certified by the federal court.

The Court of Appeals therefore entered judgment against Redgrave on her MCRA claim without any court having applied law to fact. This further misuse of the certification process deprived Redgrave of her fundamental right of due process of law.

* * *

Certification was not merely misused here. It was turned on its head. The principles of comity and federalism that certification was designed to serve instead were grossly violated by its misuse. On this point, too, the *en banc* dissent was eloquent (A57a-58a; emphasis in original):

> The ultimate irony in this manipulative reading of the SJC's opinion lies in its purported justification: faithfulness to 'principles of comity and federalism.' *Supra* at 40. Certainly, the process whereby federal courts certify doubtful questions of state law to state courts can 'save time, energy, resources and hel[p] build a cooperative judicial federalism.'' *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). And where, as here, a state court delivers a definite answer to a question of state law which has been put to it, in the interest of comity that answer is normally conclusive in federal court. Even a *definite* answer to a question of state law *not* explicitly certified is welcome and entitled to considerable deference. But such principles simply are not involved in the extraordinary action taken by this court today. Not only does the majority of this court ignore the direct answers supplied by the SJC to the questions we certified, it finds controlling a question of law that was never even reached by a majority of the SJC . . . .
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> [T]he majority . . . enter[s] into a guessing game about what the SJC 'would' have done if we *had* certified [certain] questions [that were not certified]. The majority opinion is riddled with terms of speculation, actually using

> the word 'would' more than twenty times to describe what the SJC 'would' decide *if* all the state law issues had been put squarely before it.
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> The majority's opinion amounts to nothing more than a prediction, a 'hunch,' based on comments, or at best dicta, contained in the SJC's opinions, that the SJC 'would' decide the question of constitutional law raised by this case in favor of the BSO and that the state constitutional ruling 'would' be independent from the federal Constitution. This approach turns comity on its head, and makes a mockery of the certification process.
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> Far from deferring to state court prerogative, the majority's action places a federal court in the position of itself deciding a delicate and unresolved question of state law. In so doing, the court disregards the words of the SJC's answers to the certified questions by reading into those answers a view the SJC expressly declined to adopt. And, to make matters worse, the Court has resolved the state law issues in a manner that actually constitutes a *break* with existing state court precedent. Today, the United States Court of Appeals for the First Circuit effectively makes itself the first court ever to hold, as a matter of state law, that free speech rights under the Massachusetts Constitution are *not* based on federal court interpretations of the first amendment.

In *City of Houston* v. *Hill*, 107 S. Ct. 2502, 2515, n.23 (1987), this Court commented:

> [I]t would . . . be inappropriate for a federal court to certify the entire constitutional challenge to the state court, of course, for certified questions should be confined to uncertain questions of state law.

While the Court of Appeals in the case at bar did not literally certify a constitutional challenge to the State court, the Court of Appeals might as well have done just that: By refusing to decide the constitutional challenge to MCRA liability, and otherwise abdicating its judicial responsibilities, the Court of

Appeals permitted the certification device to violate rights and processes basic to our constitutional fabric. *Cohens* v. *Virginia*, 6 Wheat. 264, 404 (1821) (Marshall, C.J.) ("With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution"); *Colorado River Water Conservation Dist.* v. *U.S.*, 424 U.S. 800, 818 (1976) (referring to "the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them"); *Meredith* v. *Winter Haven*, 320 U.S. 228, 234 (1943) ("The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts").

This Court should take this case to ensure that the certification process is administered consistent both with litigants' rights and with the principles of "Our Federalism."

II

THE "HOLDING" BELOW, THAT THERE IS AN "ARTISTIC INTEGRITY" CONSTITUTIONAL DEFENSE TO MCRA LIABILITY, DESERVES REVIEW

The decision below holds—without an independent state ground—that a very significant new piece of civil rights legislation is unconstitutional, at least as applied.

The most glaring thing about the decision below is the complete absence of constitutional analysis that went into it.

The Court of Appeals *en banc* majority did not analyze the constitutional law issue. To be sure, the *en banc* majority devoted several pages (A 28a-34a) to an academic discussion of possible constitutional considerations, but that discussion ended as follows (A 33a; emphasis added): "We raise these points *not* to resolve the constitutional questions . . . ."

The MSJC's answers, meanwhile, commented cryptically on the constitutional issue. The MSJC's comments contained no analysis of the nature of BSO's supposed free speech right; no

discussion at all of the important State interest that the MCRA obviously embodies; no analysis of whether the MCRA might constitute permissible regulation; no discussion of whether that statute is content-neutral as regards anyone's speech; and no attempt to apply the tests that have been fashioned by this Court to weigh the constitutionality of such legislation as against a First Amendment challenge. All this is absent because the MSJC was not deciding any issue of constitutional law but only raising issues for subsequent consideration by the Court of Appeals.

The decision below is clearly contrary to this Court's prior rulings, which compel a careful balancing of interests before any statute is overturned as violative of the First Amendment. The court below did not merely apply the wrong test of constitutionality, it applied no test at all.

We have much to say on this subject, but for now we are constrained and must confine ourselves to directing the Court's attention to the *en banc* dissenters' analysis of the issue (A 58a-67a), and the following few additional thoughts:

1. By entering into contracts with Redgrave, and many others, BSO exercised its right to perform "Oedipus Rex" and relinquished the concomitant right not to be legally penalized for doing so. Under common law, contract damages are the appropriate remedy, or penalty, for BSO's changing its mind once it had exercised its rights by planning the "Oedipus Rex" program and engaging artists to perform it. Civil rights statutes, including but not limited to the MCRA, supplement the common law.[19]

The First Amendment no more gave BSO the right to change its mind about performing without incurring liability on a civil rights claim than it would on a contract claim—including but

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19 The MCRA resembles many federal and state laws prohibiting discrimination in employment, education, public accommodations, and housing, in that it imposes certain constitutionally-based norms on private conduct. *E.g.*, Titles II, VI, and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000d, 2000e *et seq.*; Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 *et seq.* Many entities covered by these antidiscrimination laws engage in First Amendment activity, including newspapers, publishers, theaters, ballets, topless dancing establishments, private schools and universities, utility companies and banks.

not limited to any claim by BSO ticketholders for return of the price of their tickets. BSO is liable, to those ticketholders for the price of admission, and to others on other grounds, regardless of whether or not BSO decided not to perform out of concern that its performance somehow might not be up to artistic par.

BSO's claim that it cancelled for reasons of "artistic integrity," because of hypothetical audience disruption, certainly does not rise to the level of a constitutional right that immunizes BSO from civil rights liability.[20] At best for BSO, BSO's concern for "artistic integrity" is, rather, merely one of those concerns that, the MSJC held in answering the second certified question (A 25a; 116a-117a), is subservient to the overriding State interest in providing a remedy for interference with basic rights, and that the Massachusetts Legislature did not intend to be a defense to MCRA liability.

2. Even if it could be said that BSO had some constitutionally protected interest that could be affected by MCRA liability here, that would not defeat Redgrave's MCRA claim. The speech content-neutral requirement that BSO abide by the MCRA is no more violative of BSO's constitutional rights than the speech content-neutral law that requires BSO to have visible exit signs, and lights, at various points in its establishment: Both serve compelling state interests, and, if they intrude at all upon BSO's expression, they do so minimally, and consistent with constitutional standards. *See, e.g., Board of Directors of Rotary International v. Rotary Club of Duarte*, 107 S.Ct. 1940, at 1947 (1987); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, at 650-53 (1985); *Roberts v. United States Jaycees*, 468 U.S. 609, at 624-28 (1984); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, at 222 (1977).

This substantive issue is worthy of grant of certiorari. The decision below holds unconstitutional an important new civil rights statute, deprives Redgrave and others of a remedy for

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20 Indeed, as the *en banc* dissent pointed out, BSO's argument for "artistic integrity" in fact "is the opposite of 'artistic integrity'; it [would] allow the audience to dictate who shall perform, and what shall be played. 'Artistic integrity' under this view would be a license for the heckler's veto in the arena of artistic expression." (A 66a).

interference with the exercise of constitutional rights, and threatens the enforcement of other hitherto settled rules of law. That profound result was accomplished by an unprecedented extension of the constitutional law of free speech, without any constitutional analysis, and on the basis of mere dicta.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 29, 1988

88-9120

No. _____

Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VANESSA REDGRAVE

Petitioner,

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 85-1305

VANESSA REDGRAVE and
VANESSA REDGRAVE ENTERPRISES, LTD.,

Plaintiffs, Appellants,

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Defendant, Appellee.

No. 85-1341

VANESSA REDGRAVE and
VANESSA REDGRAVE ENTERPRISES, LTD.,

Plaintiffs, Appellees,

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, *U.S. District Judge*]

Before

COFFIN, BOWNES, BREYER, TORRUELLA and SELYA,
Circuit Judges.

Daniel J. Kornstein with whom *Marvin Wexler* and *Kornstein Veisz & Wexler* were on brief for Vanessa Redgrave and Vanessa Redgrave Enterprises, Ltd.

Barbara Arnwine, *Alan Jay Rom*, Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association, *F. Anthony Mooney*, *Maria O'Brien Hylton*, *Hale & Dorr*, and *Marjorie Heins*, Massachusetts Civil Liberties Union Foundation, on brief for Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association and the Civil Liberties Union of Massachusetts, Amici Curiae.

Robert E. Sullivan with whom *John T. Harding, Jr.*, *Cassandra Warshowsky*, *Palmer & Dodge*, *Keith C. Long* and *Nutter, McClennen & Fish* were on brief for Boston Symphony Orchestra, Inc.

Marvin N. Geller, *Thomas M. Sobol* and *Brown, Rudnick, Freed & Gesmer* on brief for American Jewish Congress, Amicus Curiae.

Todd L.C. Klipp, *Stephen A. Williams* and *Michael B. Rosen*, Office of the General Counsel, on brief for Trustees of Boston University, Amicus Curiae.

Philip Burling, *Stephen B. Deutsch* and *Foley, Hoag & Eliot* on brief for Boston College and Tufts University, Amici Curiae.

OPINION EN BANC

AUGUST 31, 1988

COFFIN, *Circuit Judge*. This complex litigation has involved this court at three stages. On first hearing the appeal from the district court we certified two questions to the Supreme Judicial Court of Massachusetts. After considering its responses, together with its suggestions on an issue not expressly raised by either question, a panel of this court agreed on the disposition of issues relating to plaintiffs' contract claim but divided as to the disposition of a claim under the Massachusetts Civil Rights Act (MCRA), Mass. Gen. L. ch. 12, §§ 11H—I (1986). Subse-

quently, the panel opinion and dissent were withdrawn in order to reconsider the MCRA claim in an en banc proceeding. We now proceed with our en banc opinion, which includes and reaffirms the panel's position on the contract claim, but differs from the panel majority by concluding that, as a matter of Massachusetts law, defendant is not subject to MCRA liability.

The plaintiffs, actress Vanessa Redgrave and Vanessa Redgrave Enterprises, Ltd. (hereinafter Redgrave), brought suit against the Boston Symphony Orchestra (hereinafter the BSO) for cancelling a contract for Redgrave's appearance as narrator in a performance of Stravinsky's "Oedipus Rex." The cancellation occurred in the wake of protests over Redgrave's participation because of her support of the Palestine Liberation Organization. She sought recovery both for breach of contract and for violation of her civil rights under the MCRA.[1]

A jury awarded Redgrave $100,000 in consequential damages caused by the BSO's breach of contract; sitting in an advisory capacity on Redgrave's MCRA claim, the jury found for the BSO. On the BSO's motion for judgment notwithstanding the verdict on the consequential damages issue, the district court held that the evidence of consequential damages was sufficient but that Redgrave could not recover these damages because of First Amendment limitations. The court also held that the MCRA does not impose liability on a party for acquiescence to third party pressure. Redgrave appealed from these rulings, and the BSO cross-appealed, arguing that the evidence of consequential damages was insufficient.

We conclude, in Part II, that the district court erred in reversing the jury's award of consequential damages, but that Redgrave has presented sufficient evidence to prove only $12,000 in consequential damages, minus certain expenses. In Part III, we report and accept the response of the Massachusetts Supreme Judicial Court to our certified questions that acquiescence to third party pressure is not a defense to an action under the MCRA. In Part IV, we discuss the conclusions of the Justices of the Supreme Judicial Court that, for different but consistent

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1 Redgrave Enterprises Ltd. was a plaintiff only as to the contract claim; it did not join the MCRA claim.

reasons of Massachusetts law, the BSO is not subject to MCRA liability in these circumstances. We therefore affirm the judgment for the BSO on the MCRA claim and remand for entry of a reduced judgment for consequential damages on the contract claim.

I. PROCEDURAL HISTORY

In March 1982, the Boston Symphony Orchestra (BSO) engaged Vanessa Redgrave to narrate Stravinsky's "Oedipus Rex" in a series of concerts in Boston and New York. Following announcement of the engagement, the BSO received calls from its subscribers and from community members protesting the engagement because of Redgrave's political support for the Palestine Liberation Organization and because of her views regarding the state of Israel. On or about April 1, 1982, the BSO cancelled its contract with Redgrave and its performances of "Oedipus Rex."

Redgrave sued the BSO for breach of contract and for violation of the MCRA. The BSO argued at trial that the contract rightfully was cancelled because the cancellation was the result of "a cause or causes beyond the reasonable control" of the BSO. In response to the civil rights claim, BSO agents testified that they had not cancelled the performances in order to punish Redgrave for her past speech or repress her future speech, but because it was felt that potential disruptions, given the community reaction, would implicate the physical safety of the audience and players and would detract from the artistic qualities of the production.

Following a sixteen-day trial, the jury found that the BSO wrongfully had breached its contract with Redgrave. On that basis, the district court awarded Redgrave her stipulated performance fee of $27,500. The jury also found that the BSO's cancellation had damaged Redgrave's career by causing loss of future professional opportunities, and awarded Redgrave $100,000 in consequential damages. The district court found that the question whether there was sufficient evidence to support a finding of $100,000 in consequential damages was a

"close and debatable" one, but concluded that there was sufficient evidence to support the award. Nevertheless, the district court overturned the grant of consequential damages,[2] finding that a First Amendment right of freedom of speech was implicated by the theory of consequential damages advanced by Redgrave and that Redgrave had not met the strict standards required by the First Amendment for recovery of damages. *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1193-1203 (D. Mass. 1985).

Redgrave's MCRA claim was premised on the allegation that the BSO had interfered, "by threats, intimidation, or coercion," with Redgrave's exercise of free speech rights. Mass. Gen. L. ch. 12, §§ 11H—I. The district court utilized the jury in an advisory capacity on this claim. In response to special interrogatories, the jury found that the BSO did not cancel the contract because of the disagreements of BSO agents with Redgrave's political views. The district court stated that this finding eliminated an "essential factual premise" of Redgrave's primary claim based on the MCRA. 602 F. Supp. at 1192.

But Redgrave also argued that, even if BSO agents had not themselves disagreed with Redgrave's political views and did not cancel the contract because they wished to punish her for past speech or to repress her future speech, the BSO did cancel the contract in response to pressure from third parties who disagreed with and wished to repress Redgrave's speech. Redgrave contended that such acquiescence to third parties on the part of the BSO made it liable under the MCRA. The district court concluded that acquiescence unaccompanied by express personal disagreement with Redgrave's views could not amount to the "threats, intimidation, or coercion" needed to establish a claim under the MCRA. 602 F. Supp. at 1192. The district court, therefore, rejected Redgrave's acquiescence theory and entered judgment for the BSO on Redgrave's MCRA claim.

Redgrave appealed from the district court's entry of judgment notwithstanding the verdict on the consequential damages claim and from the judgment against her on the MCRA claim.

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2 The court apparently submitted the factual question to the jury either before it decided the legal issue or to protect against the need for a retrial in the event of reversal on appeal.

The BSO cross-appealed, arguing that even if the First Amendment should be found inapplicable to the consequential damages claim, the evidence of those damages was insufficient to support the verdict.

II. THE CONSEQUENTIAL DAMAGES CLAIM

A. *Consequential Damages for Loss of Professional Opportunities*

In response to special interrogatories, the jury found that the BSO's cancellation of the "Oedipus Rex" concerts caused consequential harm to Redgrave's professional career and that this harm was a foreseeable consequence within the contemplation of the parties at the time they entered the contract. 602 F. Supp. at 1204. A threshold question is whether Massachusetts contract law allows the award of such consequential damages for harm to a claimant's professional career.

Redgrave's consequential damages claim is based on the proposition that a significant number of movie and theater offers that she would ordinarily have received in the years 1982 and following were in fact not offered to her as a result of the BSO's cancellation in April 1982. The BSO characterizes this claim as one for damage to Redgrave's reputation,[3] and argues that the recent Massachusetts state court decisions in *McCone* v. *New England Telephone & Telegraph Co.*, 393 Mass. 231, 471 N.E.2d 47 (1984), and *Daley* v. *Town of West Brookfield*, 19 Mass. App. Ct. 1019, 476 N.E.2d 980 (1985), establish that Massachusetts law does not permit plaintiffs in breach of contract actions to recover consequential damages for harm to reputation.

In *McCone* v. *New England Telephone & Telegraph Co.*, plaintiffs alleged that their employer's breach of an implied covenant of good faith had caused them loss of salary increases, loss of pension benefits, and "damage to their professional rep-

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3 The BSO notes that Redgrave contended that "the cancellation, as communicated to other employers through the news media, harmed Vanessa Redgrave because it carried with it the message 'that Vanessa Redgrave was unemployable,' a claim for damage to Redgrave's reputation."

utations, disruption of their personal lives, and great pain of body and mind." 393 Mass. at 234 n.8. The Massachusetts Supreme Judicial Court held that the claims for damages to reputation and other emotional injury could not be sustained in the suit because "these additional damages are not contract damages." *Id.* In *Daley* v. *Town of West Brookfield*, a Massachusetts appellate court observed that "[d]amages for injury to reputation are usually not available in contract actions," noting that the rationale most often given is that "such damages are remote and not within the contemplation of the parties." 19 Mass. App. Ct. at 1019 n.1, 476 N.E.2d at 980 n.1.

The BSO notes that Massachusetts is in agreement with virtually all other jurisdictions in holding that damages for reputation are not available in contract actions. *See, e.g., Volkswagen Interamericana, S.A.* v. *Rohlsen*, 360 F.2d 437, 446 (1st Cir. 1966) (applying federal law); *Stancil* v. *Mergenthaler Linotype Co.*, 589 F. Supp. 78, 84-85 (D. Haw. 1984); *O'Leary* v. *Sterling Extruder Corp.*, 533 F. Supp. 1205, 1209 (E.D. Wis. 1982); *Skagway City School Board* v. *Davis*, 543 P.2d 218, 225-27 (Ala. 1975); *Tousley* v. *Atlantic City Ambassador Hotel Corp.*, 25 N.J. Misc. 88, 50 A.2d 472, 474-75 (N.J. Sup. Ct. 1947). This impressive line of cases, however, becomes less impressive for our purposes when the reasoning in these cases is analyzed with reference to the particular claim put forth by Redgrave.

In cases that have analyzed the reasons for disallowing a contract claim for reputation damages, courts have identified two determinative factors. First, courts have observed that attempting to calculate damages for injury to reputation is "unduly speculative." *Skagway City School Board*, 543 P.2d at 225. *See O'Leary*, 533 F. Supp. at 1209; *Tousley*, 50 A.2d at 474-75. In many cases, the courts have viewed the claims for damages to reputation as analogous to claims for physical or emotional distress and have noted the difficulty in ascertaining such damages for contract purposes. *See, e.g., Westwater* v. *Rector, Warden and Vestry of Grace Church*, 140 Cal. 339, 342, 73 P. 1055 (1903) ("Damages to health, reputation, or feelings are not clearly ascertainable either in their nature or origin."). As the court in *Skagway* noted, an estimate of injury to reputation "must rest upon a number of imprecise variables," including

the causal connection between the breach of contract and the injury to reputation and the amount by which any future earnings would be decreased by causes other than the breach. *Skagway City School Board*, 543 P.2d at 225.

The second factor that courts identify is that damages for injury to reputation "cannot reasonably be presumed to have been within the contemplation of the parties when they entered into the contract." *Skagway City School Board*, 543 P.2d at 225. These courts state that the basic rule of *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), which requires that contract damages be of the kind that arise naturally from the breach of a contract or be of a kind that reasonably may have been in the contemplation of the parties when they entered the contract, cannot possibly be met in a claim for general damages to reputation occurring as the result of a breach of contract. *See Skagway City School Board*, 543 P.2d at 225; *O'Leary*, 533 F. Supp. at 1209-10; *Tousley*, 50 A.2d at 474-75; *Mastoras* v. *Chicago, M. & St. P. R.R.*, 217 F. 153, 154 (W.D. Wash. 1914). The Massachusetts Supreme Judicial Court seems to have accepted this rationale as a legitimate one for disallowing claims for injury to reputation as a contract damage. *See Daley* v. *Town of West Brookfield*, 476 N.E.2d at 980 n.1 ("The rationale often given [for disallowing damages for injury to reputation in contract actions] is that such damages are remote and not within the contemplation of the parties."). *See also* 5 *Corbin on Contracts*, § 1007-11 at 70-87 (1964); 11 Williston, *Contracts*, § 1344 at 226-29 (1968) (discussing *Hadley* v. *Baxendale* general rule of consequential damages).

The claim advanced by Redgrave is significantly different, however, from a general claim of damage to reputation. Redgrave is not claiming that her general reputation as a professional actress has been tarnished by the BSO's cancellation. Rather, she claims that a number of specific movie and theater performances that would have been offered to her in the usual course of events were not offered to her as a result of the BSO's cancellation. This is the type of specific claim that, with appropriate evidence, can meet the *Hadley* v. *Baxendale* rule, as adopted by the Massachusetts Supreme Judicial Court in *John Hetherington & Sons, Ltd.* v. *William Firth Co.*, 210 Mass. 8,

21; 95 N.E. 961, 964 (1911) (in breach of contract action, injured party receives compensation for any loss that follows as a natural consequence from the breach, was within the contemplation of reasonable parties as a probable result of breach, and may be computed by "rational methods upon a firm basis of facts"). As the district court correctly noted in a preliminary memorandum:

> [I]f plaintiffs proved other employers refused to hire Redgrave after termination of the BSO contract because of that termination (that loss of the other employment "followed as a natural consequence" from the termination of the contract), that this loss of other employment would reasonably have been foreseen by the parties at the time of contracting and at the time of termination, and that damages are rationally calculable, then plaintiffs may be entitled to damages that include monies for loss of the other employment. Although plaintiffs have a heavy burden to carry here, it cannot be said with certainty at this time that they will not be able to meet this burden.

Redgrave v. *BSO*, 557 F. Supp. 230, 234 (D. Mass. 1983).

The jury was given appropriate instructions to help it determine whether Redgrave had suffered consequential damages through loss of future professional opportunities. They were told to find that the BSO's cancellation was a proximate cause of harm to Redgrave's professional career only if they determined that "harm would not have occurred but for the cancellation and that the harm was a natural and probable consequence of the cancellation." *Redgrave* v. *BSO*, 602 F. Supp. at 1211. In addition, they were told that damages should be allowed for consequential harm "only if the harm was a foreseeable consequence within the contemplation of the parties to the contract when it was made." *Id.* at 1212. In response to special interrogatories, the jury found that the BSO's cancellation caused consequential harm to Redgrave's career and that the harm was a foreseeable consequence within the contemplation of the parties. 602 F. Supp. at 1204.

Although we find that Redgrave did not present sufficent evidence to establish that the BSO's cancellation caused conse-

quential harm to her professional career in the amount of $100,000, *see infra* at 20-32, we hold that, as a matter of Massachusetts contract law, a plaintiff may receive consequential damages if the plaintiff proves with sufficent evidence that a breach of contract proximately caused the loss of identifiable professional opportunities. This type of claim is sufficiently different from a nonspecific allegation of damage to reputation that it appropriately falls outside the general rule that reputation damages are not an acceptable form of contract damage.

B. *First Amendment Restrictions*

The district court found that, although consequential damages for loss of professional opportunities could be a legitimate contract claim, it was required to overturn the jury's verdict of $100,000 because Redgrave had not met the strict standards required by the First Amendment for the recovery of such damages. According to the district court, the only theory that Redgrave could advance for establishing consequential damages necessarily implicated First Amendment concerns. As the court explained, "the only possible mechanism of harm to Redgrave's professional career, revealed by the evidence, is the alleged influence of some statement made by the BSO on later decisions of others—a statement of fact or opinion implied in BSO's cancellation, or express or implied in BSO's press release." *Redgrave* v. *BSO*, 602 F. Supp. at 1197. In other words, "an inescapable element of the claimed causal connection between BSO's cancellation and consequential harm to Redgrave's professional career" was for "a factfinder reasonably [to] infer that others, upon receiving the news of BSO's cancellation, interpreted the cancellation as conveying a message about Redgrave." *Id.*

Having concluded that Redgrave's theory of consequential damages necessarily rested on the premise that the BSO had conveyed a message about her to others, the district court felt it was required to apply heightened First Amendment scrutiny to any claim for damages stemming from such communicative activity. It made the threshold decision that state action would exist because it, as a court, would enter a judgment for such

damages. 602 F. Supp. at 1199. The court then applied the standard governing damages in defamation cases. Accordingly, it required that Redgrave show that "BSO has impliedly communicated to others some material issue of fact (and not merely opinion) about Redgrave that it knew to be false, or that BSO acted with reckless disregard for the truth or falsity of a material statement of fact it impliedly communicated." 602 F. Supp. at 1201. The court concluded that, in any message the BSO could be said to have sent, no statement of fact to which the jury could apply a "reckless falsity" test could be disentangled from the BSO's statements of opinion. Further, any statements of opinion by the BSO would be protected absolutely under the First Amendment. *Id.* at 1201-03. Thus, the court found that Redgrave had not overcome the significant obstacles created by the First Amendment to recovery of consequential damages.

The district court is correct in stating that an act can be a protected form of First Amendment activity. *See, e.g., NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) (economic boycott may be form of First Amendment activity); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (contributing money is form of speech); *Cohen* v. *California*, 403 U.S. 15 (1971) (wearing sign on back of jacket is form of speech).

The BSO's cancellation of its contract with Redgrave was not, however, an act intended to be a form of symbolic speech or a "statement" by the BSO.[4] As BSO agents testified, the press release announcing the BSO's cancellation went through a number of drafts in order to remove any statement or implication that Redgrave was too controversial or dangerous to hire. In fact, the press release did not even refer to Redgrave by

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4 We are not convinced that the cancellation of a contract could ever receive First Amendment protection. Unlike engaging in an economic boycott, burning a draft card, or wearing an armband, cancelling a contract is not a traditional form of protest. We would be wary of adopting a principle that would allow a party wishing to breach its contract for economic objectives to hide behind First Amendment protections merely by stating that it has cancelled the contract in order to make a statement about the other party. This question, however, is not before us in this case.

name.[5] Indeed, in response to special verdict question 11A, the jury found that the BSO's cancellation and press release did not "impliedly state to others that BSO's managerial agents held the opinion that Vanessa Redgrave was so controversial because of her publicly expressed political views that the risks associated with the series of performances in Boston and New York, in which she was to appear as narrator, were too great to be acceptable to a prudently managed symphony orchestra." 602 F. Supp. at 1205. Thus, the evidence does not support an inference that the BSO intended its cancellation to act as a symbolic message to others.

An act not intended to be communicative does not acquire the stature of First-Amendment-protected expression merely because someone, upon learning of the act, might derive some message from it. Nor is such an act entitled to special protection merely because others speak about it. Accordingly, we believe the district court erred in reasoning that the causal link between the BSO's contract cancellation and Redgrave's harm necessarily involved protected expression by the BSO.

Redgrave's counsel presented two distinct avenues of causation through which the jury could find that the BSO's cancellation caused Redgrave consequential harm and the jury was instructed on both grounds. Besides contending that the BSO's cancellation and press release impliedly stated to others that Redgrave was too controversial to be acceptable to a prudently managed symphony orchestra, Redgrave also contended that "since BSO was a prestigious cultural organization, the very fact that it decided to cancel rather than proceed with performances in which Vanessa Redgrave was to appear would tend to influence others not to offer her future professional opportunities." *Redgrave* v. *BSO*, 602 F. Supp. at 1212. The jury was instructed to "determine whether the evidence supports either,

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5 It is true that, as a result of previous press reports regarding the community reaction to the Redgrave engagement, the public could easily infer that the BSO's cancellation of the performances resulted from the furor over Redgrave. Nevertheless, the fact that the BSO made an intentional effort not to mention Redgrave by name in the press release indicates that the act of cancellation was not intended to be a form of expression.

both, or neither of these contentions" in deciding whether the BSO's cancellation caused Redgrave consequential harm. *Id.*

The jury rejected the "implied message" theory yet still found that the BSO's contract cancellation caused Redgrave to lose future professional opportunities. Apparently, the jury felt that the BSO's cancellation had caused harm to Redgrave's career, despite its conclusion that the BSO had not intentionally sent any implied message regarding Redgrave. Theodore Mann, a director, testified that he chose not to offer Redgrave a job in a theater performance because

> [t]he Boston Symphony Orchestra had cancelled, terminated Ms. Redgrave's contract. This had a—this is the premier or one of the premier arts organizations in America who, like ourselves, seeks support from foundations, corporations, individuals; have subscribers; sell individual tickets. I was afraid . . . and those in my organization were afraid that this termination would have a negative effect on us if we hired her.

App. 1302a. Thus, the jury could appropriately have found that even though the BSO did not intend its contract cancellation to be a purposeful symbolic communication, other performing companies may have derived, or feared that their supporters might derive, some message from the cancellation, causing them concern about hiring Redgrave. Under this theory, the jury could have found that the act of cancellation, unprotected by the First Amendment, was the proximate cause of Redgrave's harm.

The district court correctly stated that "plaintiffs must prove that in some way information about BSO's action was communicated to others." 602 F. Supp. at 1197. However, as amici correctly point out, the trial court erred in confusing communication *about* the BSO's contract cancellation with the notion of an implied communication of a particular message *by* the BSO regarding Redgrave. Absent unusual circumstances suggesting primary interest in communicating an idea transcending the immediate act, a contract cancellation would not trigger the concerns ordinarily protected by the First Amendment. Indeed, under the district court's ruling, the cancellation of almost any

contract with a notable figure could effectively be transformed into a statement protected by the First Amendment, thereby unnecessarily diluting the protections intended by contract law. Thus, although Redgrave must meet the ordinary strict contract requirements for finding consequential damages, *see infra* at 20-21, no additional requirements need be imposed in this case because of the strictures of the First Amendment.

C. *Sufficiency of the Evidence*

The requirements for awarding consequential damages for breach of contract are designed to ensure that a breaching party pays only those damages that have resulted from its breach. Thus, to receive consequential damages, the plaintiff must establish a "basis for an inference of fact" that the plaintiff has actually been damaged, Williston, *Contracts* § 1345 at 231, and the factfinder must be able to compute the compensation "by rational methods upon a firm basis of facts." *John Hetherington & Sons*, 210 Mass. at 21, 95 N.E. at 964.

In analyzing the evidence presented by Redgrave on her claim for consequential damages, we are guided by the basic principle that on a motion for judgment notwithstanding the verdict the evidence must be viewed in the light most favorable to the party for whom the jury found, and that that party must be given "the benefit of every favorable inference that may be fairly drawn." *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 885 (1st Cir. 1978) (quoting *Dumas* v. *MacLean*, 404 F.2d 1062, 1064 (1st Cir. 1968)). In examining the evidence, however, we must not neglect uncontradicted evidence offered by the other party. *Layne* v. *Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981); *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17, 19 (1st Cir. 1981). Further, the party for whom the jury found is not entitled to "unreasonable inferences which rest on conjecture and speculation." *Carlson* v. *American Safety Equipment Corp.*, 528 F.2d 384, 386 (1st Cir. 1976); *see also Goldstein* v. *Kelleher*, 728 F.2d 32, 39 (1st Cir. 1984).

In order for Redgrave to prove that the BSO's cancellation resulted in the loss of other professional opportunities, she must present sufficent facts for a jury reasonably to infer that

Redgrave lost wages and professional opportunities subsequent to April 1982, that such losses were the result of the BSO's cancellation rather than the result of other, independent factors, and that damages for such losses are capable of being ascertained "by reference to some definite standard, either market value, established experience or direct inference from known circumstances." *John Hetherington & Sons*, 210 Mass. at 21, 95 N.E. at 964. During trial, evidence was presented regarding losses Redgrave allegedly suffered in film offers and American theater offers. Based on this testimony, the jury found that the BSO's cancellation of its contract with Redgrave caused Redgrave $100,000 in consequential damages. We find that the evidence presented by Redgrave was not sufficent to support a finding of damages greater than $12,000, less expenses.

Most of Redgrave's annual earnings prior to April 1982 were derived from appearances in films and the English theater.[6] Redgrave presented evidence at trial that she earned more than $200,000 on the average since her company's fiscal year 1976, and she testified that she had a constant stream of offers from which she could choose films that had secure financial backing. After the BSO's cancellation in April 1982, Redgrave contended, her career underwent a "startling turnabout." Redgrave testified that she did not work at all for the fourteen months following the cancellation and that the only offers she received during that time were for films with insufficent financial backing.

The evidence demonstrates that Redgrave accepted three firm film offers in the fourteen months following the BSO cancellation. If these three films had been produced, Redgrave would have earned $850,000 during that period. The first offer, for a film entitled *Annie's Coming Out*, was for a role in which Redgrave had expressed interest in February 1982, two months prior to the BSO cancellation. The offer for the role was made in July 1982, a short time after the BSO's cancellation, and was

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6 Although Redgrave received a number of offers to appear in Broadway plays between 1975 and 1980, the only offer she accepted and received payment for was a 1976 play, *Lady From the Sea*, performed in off-Broadway's Circle in the Square theater, for which Redgrave received $9,000.

finalized in August 1982. The film was to be financed by Film Australia, a government production company, and no evidence was presented that Redgrave believed the film might experience financial difficulties. Redgrave's fee for the film was to be $250,000.

From July 1982 until approximately the end of October 1982, Redgrave believed that she would be filming *Annie's Coming Out* sometime during the fall.[7] Because of that commitment, Redgrave turned down other firm offers that had secure financial backing. These included an offer received in July 1982 to do a cameo appearance in a Monty Python film entitled *Yellowbeard* for $10,000 and an offer received in September 1982 to star in the television film *Who Will Love My Children?* for $150,000. In late October or early November 1982, Redgrave was informed that *Annie's Coming Out* would not be produced because of financial difficulties. No evidence was presented that the film's financial failure was related to the BSO cancellation.

In February 1983, Redgrave accepted an offer to appear in the film *No Alternatives*, for a fee of $350,000. Until June or July of 1983, Redgrave assumed that she would be filming *No Alternatives*. During that period, Redgrave turned down other offers, including an offer to appear in a film about Andre Sakharov for a fee of $70,000.[8] In June or July of 1983, Redgrave was informed that *No Alternatives* would not be filmed because of financial difficulties. Redgrave received $25,000 as a forfeiture on the contract.

In June 1983, Redgrave accepted an offer to appear in a film entitled *Track 39*, for a fee of $250,000. This film fell through in late July 1983. There was no allegation that the financial fail-

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7 Redgrave testified that the original departure date for Australia had been postponed from October 11th to November 2d, and that she could not recall whether it was in late October or early November that she found out that the film had fallen through.

8 Redgrave testified that she turned down the offer for the Sakharov film because she obtained "alternative work" and because she was afraid the film might be used as anti-communist propaganda. There was no evidence that this film did not have secure financial backing.

ures of either *No Alternatives* or *Track 39* were directly related to the BSO cancellation.

Although there is no doubt that Redgrave did not have a successful financial year following the BSO cancellation, we cannot say that she presented sufficient evidence to prove that her financial difficulties were caused by the BSO cancellation. No evidence was presented that, at the time she accepted the offer for *Annie's Coming Out*, Redgrave believed the film would experience financial difficulties.[9] In addition, there was no allegation that the offers Redgrave turned down because of her commitment to *Annie's Coming Out*, such as offers to appear in *Yellowbeard* and *Who Will Love My Children?*, did not have firm financial backing. If *Annie's Coming Out* had been produced, Redgrave would have earned $250,000 in the year following the BSO cancellation—an amount equal to Redgrave's average earnings before April 1982.

Redgrave contends, however, that the film offers she received following the BSO cancellation lacked secure financial backing and were thus significantly different from offers she had received prior to the cancellation.[10] Thus, although Redgrave would have received $600,000 had *No Alternatives* and *Track 39* been produced, she argues that the fact that she had to accept two films that ultimately were not produced was itself a result of the BSO cancellation.

We have some doubt as to whether Redgrave presented sufficent evidence to prove that the type of film offers she received in the year following the BSO cancellation were radically different from the film offers received before the cancellation. On direct examination, Redgrave testified regarding her previous performances, starting from 1966. As to most of the years, Redgrave testified solely regarding the work she did, rather than the offers she received, noting that she could only

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9 In fact, Redgrave expressed an interest in filming *Annie's Coming Out* in February 1982, two months before the BSO cancellation.

10 We assume that Redgrave's claim must refer primarily to offers made after November 1982, when she learned that *Annies Coming Out* would not be produced. Offers made before that time, for projects that would have conflicted with the filming of *Annie*, presumably would not have been accepted by Redgrave in any case.

"remember what [she] actually did at the moment" and not the offers she had received. Redgrave did testify that she received four film offers in 1980, none of which she accepted, and four film offers in 1981, two of which she accepted. No evidence was presented, however, regarding the financial backing of those films that were offered to Redgrave but which she did not accept. Thus, the evidence does not present an effective comparison between the type of film offers received before and after the BSO cancellation and we are left primarily with Redgrave's allegation that the film offers received in the two time periods were significantly different.

Even if we accept, however, that Redgrave proved she had experienced a drop in the quality of film offers following the BSO cancellation, Redgrave must also prove that the drop was proximately caused by the BSO cancellation and not by other, independent factors. Redgrave failed to carry her burden of presenting evidence sufficient to allow a jury reasonably to infer this causal connection.

The defense introduced evidence that Redgrave's political activities and statements had generated much media attention prior to the incident with the BSO. Redgrave conceded that her agents had informed her, prior to April 1982, that certain producers were hesitant to hire her because of the controversy she generated. And, in a newspaper interview in February 1982, Redgrave stated that she "had lost a lot of work because of her political beliefs" but that every time there had been a move to stop her working, "an equally terrific response [came] forward condemning any witch hunts." App. 983.

To the extent that Redgrave may have experienced a decline in the quality of film offers received subsequent to April 1982, that decline could have been the result of Redgrave's political views and not the result of the BSO's cancellation.[11] Even if the cancellation highlighted for producers the potential problems in hiring Redgrave, it was Redgrave's burden to establish that, in

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11 In addition, immediately following the BSO cancellation, Redgrave stopped using the services of her long-term agent, Bruce Savan, and engaged the services of the William Morris agency. After one year, Redgrave re-engaged Savan. The BSO contends that the change in agencies could have been an additional factor causing any decline in offers.

some way, the cancellation itself caused the difference in film offers rather than the problems as highlighted by the cancellation. Redgrave produced no direct evidence from film producers who were influenced by the cancellation. Thus, the jury's inference that the BSO cancellation had caused Redgrave consequential damages was one based more on "conjecture and speculation," *Carlson* v. *American Safety Equipment Corp.*, 528 F.2d at 386, than on a sufficent factual basis.

Redgrave also claims that the BSO's cancellation caused a drop in her offers to perform on Broadway. Bruce Savan, Redgrave's agent, testified regarding all offers to perform in American theater that had been made to Redgrave prior to April 1982. The offers averaged from two to four plays in the years 1976-1980. There was no evidence of any offers to perform on Broadway made to Redgrave in 1981, the year immediately preceding the BSO cancellation. Redgrave accepted only one of the offers made during this time period, appearing in *Lady From the Sea* in off-Broadway's Circle in the Square in 1976.

Redgrave contends that, as a result of the BSO cancellation, she no longer received offers to appear on Broadway. She testified that in April 1983 she was appearing in a successful English theater production of The *Aspern Papers* and was led to believe by the producers that the show would move to New York. Although it was Redgrave's opinion that the reason the play did not move to Broadway was because of the "situation" caused by the BSO cancellation, there was no testimony from the producers or others as to why the production did not go to Broadway. Redgrave also testified that in August 1983 she was asked by the Jujamson producers to appear in *The Abdication*, but that the play was never produced. Again, there was no testimony from the producers or others as to why the production did not materialize. In addition, Redgrave testified that Lillian Hellman had wished Redgrave to portray Hellman in a theater production on Broadway, but that Hellman was concerned about the BSO incident. Finally, Redgrave testified that Theodore Mann had considered offering her a role in *Heartbreak House* at Circle in the Square, but decided not to extend the offer because of the ramifications of the BSO cancellation.

Theodore Mann was the one producer who testified regarding his decision not to employ Redgrave in a Broadway production. He explained that

> the Boston Symphony Orchestra had cancelled, terminated Ms. Redgrave's contract. This had a—this is the premier or one of the premier arts organizations in America who, like ourselves, seeks support from foundations, corporations, individuals; have subscribers; sell individual tickets. I was afraid . . . and those in my organization were afraid that this termination would have a negative effect on us if we hired her. And so we had conferences about this. We were also concerned about if there would be any physical disturbances to the performance. . . . And it was finally decided that we would not hire [Redgrave] because of all the events that had happened, the cancellation by the Boston Symphony and the effects that we felt it would have on us by hiring her.

App. 1302a.

The evidence presented by Redgrave concerning her drop in Broadway offers after April 1982, apart from Mann's testimony, is not sufficient to support a finding of consequential damages.[12] We do not, of course, question Redgrave's credibility in any way. Our concern is with the meager factual evidence. Redgrave had to introduce enough facts for a jury reasonably to infer that any drop in Broadway offers was proximately caused by the BSO cancellation and not by the fact that producers independently were concerned with the same factors that had motivated the BSO. Mann's testimony itself reflects the fact that many producers in New York may have been hesitant about hiring Redgrave because of a feared drop in subscription support or problems of physical disturbances. Apart from

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12 We note that Redgrave's claim regarding American theater offers is both stronger and weaker than her claim regarding film offers. On the one hand, Redgrave indeed did not receive any Broadway offers in 1982, in contrast to various film offers and inquiries that she did receive throughout 1982. On the other hand, Redgrave failed to present evidence of any Broadway offers made to her in 1981, weakening her assertion that a dramatic decline in such offers occurred subsequent to April 1982.

Mann's testimony, Redgrave presented nothing other than the fact that three expected offers or productions did not materialize. This type of circumstantial evidence is not sufficent to support a finding of consequential damages.

In addition, we note that it would be difficult for any assessment of damages resulting from the lack of Broadway theater offers to meet the standard that damages must be "capable of ascertainment by reference to some definite standard, either market value, established experience or direct inference from known circumstances." *John Hetherington & Sons*, 210 Mass. at 21, 95 N.E. at 964. *See Lowrie* v. *Castle*, 225 Mass. 37, 51-52, 113 N.E. 206 (1916); Williston, *Contracts*, § 1346 at 239-240. The three specific performances to which Redgrave referred, other than Mann's, were never performed on Broadway and there is no indication of the compensation Redgrave would have received. In addition, Redgrave had accepted only one Broadway offer among the many she had received over the years because, according to Redgrave, the scripts were not good enough for her first Broadway appearance. There was no evidence that Redgrave would necessarily have accepted any Broadway offer made in 1982.

Mann's testimony regarding the production of *Heartbreak House* is the one piece of evidence from which reasonable factfinders could draw conflicting inferences and upon which a reasonably ascertainable damage award could be granted. We therefore defer to the inferences drawn by the jury from that testimony and grant Redgrave damages on that basis.

Mann's testimony reveals that, in considering whether to hire Redgrave, he and his partners were concerned about losing support from foundations and subscribers, having difficulty selling tickets, and dealing with possible physical disruptions. These are factors that result from the community response to Redgrave's political views. They are the same factors that apparently motivated the BSO to cancel its contract with Redgrave and are not the result of that cancellation. Thus, one possibly could infer from Mann's testimony that the BSO cancellation was not a proximate cause of the damage suffered by Redgrave in being denied the part in *Heartbreak House*.

Mann also testified, however, that he and his partners were affected by the BSO cancellation because the BSO was a premier arts organization and was dependent on the same type of support as Circle in the Square. A jury reasonably could infer that the BSO's cancellation did more than just highlight for Mann the potential problems that hiring Redgrave would cause but was actually a cause of Mann's decision, perhaps because Mann's theater support was similar to that of the BSO or because Mann felt influenced to follow the example of a "premier arts organization." Because this is a possible inference that a jury could draw from Mann's testimony, we defer to that inference. We therefore find that Redgrave presented sufficent evidence to prove consequential damages of $12,000, the fee arrangement contemplated by Mann for Redgrave's appearance in *Heartbreak House*, minus expenses she personally would have incurred had she appeared in the play.

III.

THE MASSACHUSETTS CIVIL RIGHTS CLAIM AND THE DEFENSE OF ACQUIESCENCE TO THIRD-PARTY PRESSURE

The factor that converts this case from a garden variety, if not simple, contract action into an exotic plant without very apposite precedents is the MCRA (and its judicial gloss as added by the Massachusetts Supreme Judicial Court). As we shall see, the MCRA extends the 42 U.S.C. § 1983 concept of a civil rights claim against government officials to a claim against private individuals, so that it is no defense to the MCRA to show that the defendant's action was not "state action." Further, as with a typical civil rights claim against a government official, it is no defense to the MCRA to show that a defendant acted in response to third-party pressure. Finally, the sweeping liability resulting from the absence of these defenses may be limited by a constitutional right of free speech.

A. *The Nature of the Claim*

The MCRA creates a private cause of action for injunctive and other equitable relief, including damages, against "any person or persons, whether or not acting under color of law, [who] interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth." Mass. Gen. L. ch. 12, §§ 11H-I (1986). A right is "secured" against private parties under the MCRA even though the constitutional provision from which it emanates applies only to government action. *See Bell* v. *Mazza*, 394 Mass. 176, 474 N.E.2d 1111 (1985). In this fashion the MCRA dispenses with the state action requirement of ordinary civil rights claims, by permitting a plaintiff to sue a private party for action that would be, absent the MCRA, forbidden only to state actors.[13]

Redgrave alleged that the BSO interfered with her "secured" rights of free speech and free association under the First Amendment[14] and the Massachusetts Constitution.[15] Redgrave

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13 Although Massachusetts has omitted, state action as an element of an MCRA claim, Massachusetts' own action in creating rights and duties under the MCRA is, of course, state action. Consequently, rights and duties under the MCRA are limited by the various constitutional constraints on state action.

14 "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This amendment is, of course, now applicable to the states.

15 Article 16 of the Declaration of Rights to the Constitution of the Commonwealth guarantees that "[t]he right of free speech shall not be abridged."

Article 19 of the Massachusetts Declaration of Rights provides that "[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

asserted that her secured rights were violated whether the BSO cancelled the contract because its own agents disagreed with her political views and intended to punish her for past speech or repress her future speech, or whether the BSO cancelled the contract because it acquiesced to pressure from third parties who disagreed with her views and intended to punish her or chill her expression.

B. *The Findings Below*

The jury, in answer to a special interrogatory, found that the BSO did not cancel the contract because its own agents disagreed with Redgrave's political views. Although the district court found that the BSO cancelled because of outside pressure, the court held that Redgrave's MCRA claim failed, because acquiescence to third party pressure, absent any discriminatory intent, did not constitute "threats, intimidation, or coercion" under the MCRA.

The court did not go further and make a finding as to the precise reason why the BSO cancelled, but it did find credible the testimony of BSO officials that the BSO cancelled because of concerns over the physical safety of the performers and audience and over disruptions that might jeopardize the artistic qualities of the performance. The court cited the testimony of, among others, Seiji Ozawa, the BSO's Music Director, who explained that his conception of "Oedipus Rex" required an "atmosphere of hearing" in which both performers and audience could concentrate, rather than an atmosphere influenced by shouting, booing, and the presence of uniformed police. Earlier in the case, the district court had noted that "the extent to which a broad interpretation of the MCRA could interfere with the BSO's First Amendment rights to make artistic judgments may depend upon whether the factfinder decides that the cancellation of the concerts was at least in part for artistic reasons." In ultimately ruling for the BSO on Redgrave's MCRA claim, however, the district court did not reach this constitutional issue.

C. *Our Certified Questions and the Answers*

Because we felt that Redgrave's MCRA claim turned on a significant question of Massachusetts law on which we found no controlling precedent, we certified two questions of law to the Supreme Judicial Court of the Commonwealth pursuant to Supreme Judicial Court Rule 1:03. The questions were as follows:

> 1. Under the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11H and § 11I, may a defendant be held liable for interfering with the rights of another person, by "threats, intimidation, or coercion", if the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights?
>
> 2. If a defendant can be held liable under the Massachusetts Civil Rights Act for acquiescence to third party pressure, is it a defense for the defendant to show that its actions were independently motivated by additional concerns, such as the threat of extensive economic loss, physical safety, or particular concerns affecting the defendant's course of business?

The Supreme Judicial Court answered "Yes" to the first question. It held:

> Making an exemption for civil rights deprivations resulting from third-party pressure "would reward and encourage" the very conduct which the substantive statutes prohibit. *See Sarni Original Dry Cleaners, Inc.* v. *Cooke*, 388 Mass. 611, 618 n.7, 447 N.E.2d 1228 (1983). Whether the issue is phrased in terms of the existence of a specific intent requirement under the Massachusetts Civil Rights Act or a third-party pressure exemption from the statute, recognizing such an exemption would tend to eviscerate the statute and defeat the legislative policies behind the statute. Persons seeking to interfere with the civil rights of others in violation of the statute may not know or believe that the interference may lead to civil or criminal liability.

> Thus, to be effective, the provisions of §§ 11H and 11I must apply to any threatening, intimidating, or coercive behavior regardless of whether the defendant specifically intended to interfere with a right to which the plaintiff is entitled. Accordingly, we answer "yes" to the first question.

Redgrave v. *Boston Symphony Orchestra*, 399 Mass. 93, 100, 502 N.E.2d 1375, 1379 (1987). The second question was answered "No." The court held:

> As an abstract proposition, fear of business disruption, fear for economic loss, or fear for physical safety are not justifications under §§ 11H and 11I. The legislative intent would be negated if such defenses were permitted. *See Sarni Original Dry Cleaners, Inc.* v. *Cooke,* supra. In an analogous context, the Supreme Court has rejected the notion that private biases and injuries that may be inflicted as a result of such biases are permissible justifications for deprivations of constitutional rights. *Palmore* v. *Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L.Ed.2d 421 (1984). Fear that the prejudice of third-party actors may lead to a breach of the peace has also been rejected as a justification for deprivations of civil rights. *Buchanan* v. *Warley*, 245 U.S. 60, 81, 38 S. Ct. 16, 20, 62 L.Ed. 149 (1917). We recognize that explicit and imminent danger of physical harm might well in some circumstances justify interference with an individual's civil rights (*cf. Brandenburg* v. *Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L.Ed.2d 430 [1969]), but the certified question raises no such premise. Our answer to the second certified question is, "No."

399 Mass. at 101, 503 N.E.2d at 1379-80.

These answers effectively disposed of the district court's view that acquiescence to third party pressure was a defense to an MCRA action. At first blush, this might suggest, as our dissenting colleagues insist, that we must now confront the BSO's additional argument for affirmance—that the First Amendment protects it from MCRA liability. The response of the SJC, however, significantly expanded upon and went beyond the

answers to our specific questions. The nature and deliberateness of these additional remarks convince us that, as a matter of Massachusetts law, the BSO may not in these circumstances be held liable under the MCRA.

IV. THE MASSACHUSETTS CIVIL RIGHTS ACT CLAIM: THE TEACHINGS OF THE SUPREME JUDICIAL COURT

The response of the Supreme Judicial Court to our questions was divided among three groups of Justices: the Chief Justice, writing for himself and Justices Liacos and Nolan; Justice Wilkins, joined by Justice Abrams, concurring; and Justice O'Connor, joined by Justice Lynch, dissenting. All three groups thought it necessary to identify an issue we had not raised expressly in our two certified questions. All three groups indicated, in tones ranging from strong suggestion to outright certainty, a view that the BSO should not be held liable under the MCRA for exercising its free speech right not to perform.

Although all of the Justices' reflections on this issue technically may fall under the heading of dicta, they are so deliberate, so unanimously expressed, and involve such a basic proposition, that we feel constrained to listen carefully. The certification process is the only opportunity for direct dialogue between a federal and a state court. We think it pointless to turn a deaf ear to all but the direct responses to formal questions where, as here, other important issues clearly are implicated. To do so would be to elevate form over substance, to ignore a helpful opportunity to interpret state law correctly, and to demean the principles of comity and federalism. "In the absence of a definitive ruling by the highest state court, a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand,' taking into account the broad policies and trends so evinced." *Michelin Tires (Canada) Ltd.* v. *First National Bank of Boston*, 666 F.2d 673, 682 (1st Cir. 1981) (quoting *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657, 663 (3d Cir. 1980)).

As two commentators recently have noted:

> [T]he ability of the answering court to reshape or add to the issues is necessary to further the goals of certification. The answering court may be best situated to frame the question for precedential value and to control the development of its laws. If state courts take offense at a poorly framed question, they may miss a genuine opportunity to settle state law on a particular point.

Corr & Robbins, *Interjurisdictional Certification and Choice of Law*, 41 Vand. L. Rev. 411, 426 (1988). *See also Martinez* v. *Rodriquez*, 394 F.2d 156, 159 n.6 (5th Cir. 1968) (form of certified question should "not . . . restrict the [state] Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified . . ., [including] the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even *contingent* parts") (emphasis supplied); *St. Paul Fire & Marine Ins. Co.* v. *Caguas Federal Savings & Loan Ass'n of Puerto Rico*, 825 F.2d 536, 537 (1st Cir. 1986) (welcoming the advice of the answering court "on any other question of Puerto Rican law material to this case on which it would like to comment").

In order to understand the reaction of the Supreme Judicial Court, it is helpful to describe the difficulty of the free expression issues involved, and the uncommon relation of the MCRA to those issues.

A. *A Conflict of Rights*

The MCRA is an unusual statute, a civil rights law that abolishes the state action requirement for constitutional claims of deprivation of rights. This is not difficult to understand in the context of racial discrimination, the prohibition of which was the statute's primary object. *Redgrave*, 399 Mass. at 105. There, it makes sense to treat private individuals similarly to the state, just as Title VII is designed as a "private" analogue to the non-discrimination provisions of the Constitution. But where

the issue is the plaintiff's "right" to free speech, the analogy is strained.[16] Such a right traditionally has content only in relation to state action—the state must be neutral as to all expression, and must not unreasonably restrain speech or expression. The right *is* to be free of state regulation, so that all private speech is formally on equal footing as a legal matter. In the traditional context, this means that various private actors can, without state interference, battle it out in the marketplace of ideas.

In the present case, this application of the statute is made doubly unusual because, unlike in the typical discrimination case, there are free speech interests on the defendant's side of the balance as well. The plaintiff's statutory "free speech" right against the defendant is to be measured against the defendant's constitutional right against the state. If it were to enforce the statute, the state would be entering the marketplace of ideas in order to restrict speech that may have the effect of "coercing" other speech.

We have grave concerns about the implications of such a conflict. If constitutional protections are effectively to protect private expression, they must do so, to some extent, even when the expression (or lack thereof) of one private person threatens to interfere with the expression of another. To permit a newspaper, for example, wide freedom to pick and choose what to print, freedom to turn down some who would write letters or columns with which a particular newspaper (or its readers) disagrees, is to permit the newspaper to deprive certain speakers of an audience (perhaps deliberately, perhaps for "speech-content-related" reasons) or to intimidate the expression of other voices outside the newspaper. But, for the government to guarantee even some of those speakers a "newspaper" platform (or guarantee that they will not be coerced by what the newspaper decides to write or not to write) itself risks interfer-

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16 *Cf. Carpenters* v. *Scott*, 463 U.S. 825, 831-833 (1983) (there can be no private conspiracy to violate First Amendment rights under 42 U.S.C. § 1985(3) Without state action because that right "is by definition a right only against state interference").

ing with the newspaper's editorial freedom. The freedom of mediating institutions, newspapers, universities, political associations, and artistic organizations and individuals themselves to pick and choose among ideas, to winnow, to criticize, to investigate, to elaborate, to protest, to support, to boycott, and even to reject is essential if "free speech" is to prove meaningful. The courts, noting that free speech guarantees protect citizens against *governmental* restraints upon expression, have hesitated to permit governments to referee disputes between speakers lest such mediation, even when it flies the banner of "protecting speech," interfere with the very type of interest it seeks to protect.[17]

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17 Of course, a defendant's freedom of expression interests can also be implicated in a traditional race or sex discrimination case under the MCRA. We do not think it at all obvious, as do our dissenting brethren, that liability should attach if a performing group replaces a black performer with a white performer (or vice versa) in order to further its expressive interests. Unlike the case in *Palmore* v. *Sidoti*, 466 U.S. 429 (1984), cited by the dissent, there would in this case be a *conflict* of protected interests. This presents serious constitutional and statutory questions that we do not pretend to survey here. We do note, however, that the Supreme Court recently has reaffirmed the principle that discrimination might in certain circumstances be justified in order to preserve expressive integrity. *New York State Club Ass'n, Inc.* v. *City of New York*, 108 S. Ct. 2225, 2234 (1988) ("It is conceivable, of course, that an association might be able to show that it is organized for specific expressive purposes and that it will not be able to advocate its desired viewpoints nearly as effectively if it cannot confine its membership to those who share the same sex, for example, or the same religion."). *See also id.* at 2237 (O'Connor, J., concurring) ("there may well be organizations whose expressive purposes would be substantially undermined if they were unable to confine their membership to those of the same sex, race, religion, or ethnic background"); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 627 (1984) ("It is . . . arguable that, insofar as the Jaycees is organized to promote the views of young men whatever those views happen to be, admission of women . . . will change the message *communicated* by the group's speech *because of the gender-based assumptions of the audience.*") (emphasis supplied); *id.* at 633-36 (O'Connor, J., concurring in part) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice. . . . [W]hen an association is predominantly engaged in protected expression . . . state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard.").

We digress briefly to note that we disagree fundamentally with our dissenting colleagues, analysis of the constitutional questions implicated in this case. The BSO does *not* demand, as our dissenting colleagues claim, the constitutional right to perform without audience interruption, or an absolute right against any infringement of its artistic expression. Of course there are no such rights. The BSO merely alleges a constitutional right not to be penalized[18] for failing to perform an artistic work where *the BSO* believes that its expression will be compromised or ineffective. That the reason for its desire to cancel may be the potential for audience disruption does not mean that the decision should be immune from constitutional solicitude.[19] The BSO asserts, simply, a right to be free from compelled expression.

Finally, we note that, even if an artistic organization could not discriminate in favor of a white (or black, or male) performer, presumably it would have a much more compelling interest in cancelling the performance rather than acceding to the casting requirements imposed by the state, even if the reason for cancellation is fear of community reaction. Of course, we here simply point out some of the difficulties that arise when two important protected interests conflict—where there is a clash of rights. We express no view as to how, in particular cases, that clash might be resolved.

18 For constitutional purposes, it makes no difference whether the state seeks to compel expression directly by "forcing" the artist to perform, or by imposing civil liability for refusing to perform; either form of coercion is burdensome to rights of free expression.

19 There are numerous ways in which adverse performance conditions may disturb that synergistic interplay of performers and audience that is so important to the content of the performance. Of course the importance of conditions is not a constant; it will vary with the medium (music, dance, drama), the setting (Circle in the Square, Symphony Hall, Shea Stadium), the audience (young children, rock fans, opera lovers) and the performers (Barnum & Bailey, the Beastie Boys, the Bolshoi Ballet). Some performers and audiences may be able to ignore adverse conditions; others may welcome the challenge of working around or with those conditions; still others may find adverse conditions intolerable—there is a long tradition of performers stalking offstage when an audience is not to their liking. But there can be no doubt that performance conditions may sometimes be vitally important to the overall impact of a performance, to the point where, it makes little sense to speak separately of the performance's content. Visual or aural disruption

It is clear that artistic expression in the performing arts enjoys substantial constitutional protection. *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981). Protection for free expression in the arts should be particularly strong when asserted against a state effort to *compel* expression, for then the law's typical reluctance to force private citizens to act, *cf.*, *e.g.*, *Lumley* v. *Wagner*, 42 Eng. Rep. 687, 693 (Ch. 1852), augments its constitutionally based concern for the integrity of the artist. A distinguished line of cases has underscored a private party's right to refuse compelled expression. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U.S. 624 (1943) (invalidating a compulsory flag salute statute); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (invalidating a statute forcing newspapers to print candidates' replies to editorials, as an impermissible burden on "editorial control and judgment"); *Wooley* v. *Maynard*, 430 U.S. 705 (1976) (invalidating penalty for refusal to display "Live Free or Die" motto on license plate); *Pacific Gas & Elec. Co.* v. *Public Utilities Comm'n.* 475 U.S. 1 (1986) (plurality opinion) (invalidating requirement that utility place consumer group's newsletter in utility's mailings to customers).[20] "[T]he First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 108 S. Ct. 2667, 2677 (1988) (emphasis in original). We have been unable to find any case, involving the arts or otherwise, in which a state has been allowed to compel expression. The outcome urged by our dissenting colleagues would, to our knowledge, be completely unprecedented.

Redgrave conceded at oral argument, and presumably the dissent would not disagree, that persons picketing a Redgrave

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easily can destroy the intended mood and atmosphere of a performance and produce an impact on the audience different from that which the performer intended to convey.

20 *Cf. Brown* v. *Louisiana* 383 U.S. 131, 141-42 (1966) (plurality opinion) (holding that First Amendment rights "are not confined to verbal expression" but may also include "protest by silent and reproachful presence . . . .").

performance would have a free expression defense to MCRA liability. This principle logically would extend as well to persons boycotting Redgrave performances. These are activities that are *intended to* coerce the exercise of others' speech by means of public approbation and economic pressure. Indeed, that is their animating purpose. Yet they are protected, for the simple reason that we have always tolerated and encouraged private expression, rather than state compulsion, as the antidote to private speech with which we disagree. We see no reason why *less* protection should be provided where the artist refuses to perform; indeed, silence traditionally has been more sacrosanct than affirmative expression. The BSO argues that it desired simply to protect its own artistic expression, and it chose cancellation as the means of doing so. That this may have had a residual effect of coercing Redgrave's exercise of her speech should not mean that the cancellation is any less protected than expression intended to coerce such exercise.

We raise these points not to resolve the constitutional questions, but to point out how difficult those questions are to resolve, to indicate that expression-related interests appear on all sides, and to suggest that the dissent's resolution, while motivated by values we share, too easily reduces a very complex clash of rights to a simple equation that neglects the serious weight of the BSO's interests.[21]

We have no reason to think that the Massachusetts Legislature enacted the MCRA in an attempt to have its courts, at the insistence of private plaintiffs, oversee the editorial judgments of newspapers, the speech-related activities of private universities, or the aesthetic judgments of artists. To be more specific,

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21 The implications of the dissent's position underscore its problems. For instance, under the dissent's theory of the MCRA, a private university would be liable for denying tenure to a professor whose views it found politically reprehensible, or to a scholar who might cause turmoil on campus. A newspaper could not, without running afoul of the statute, cancel an opinion writer's column in response to outrage in the community, even if it meant that the newspaper's reputation was impugned or that great numbers of people stopped reading the paper. While we may commend those institutions and artists that resist such public pressure, no court has, to our knowledge, ever held legally accountable those private groups or artists that do succumb to public taste.

our examination of these difficulties helps us understand why at least four, and perhaps as many as seven, members of the Supreme Judicial Court wrote opinions indicating that the statute does not impose liability upon the BSO in the circumstances of this case.

We therefore present the responses of the Supreme Judicial Court.

B. *The Responses of the Supreme Judicial Court*

1. *The Plurality*

Chief Justice Hennessey was sufficiently concerned by "some serious issues which are not addressed in the questions but which are suggested by the record of the case" that he discussed these issues even before answering our questions. 399 Mass. at 97, 502 N.E.2d at 1377. The Chief Justice wrote:

> It can be inferred from the record that the BSO was itself a victim of violations of G.L. c. 12, § 11H, by those persons who put pressure on the BSO to cancel the Redgrave participation. From the premise that the BSO had the free speech right to perform or not as it saw fit, it can be argued that the BSO's secured rights were interfered with, and that it was not within the legislative intent that anyone should be punished under c. 12 for exercising the constitutional right not to speak (i.e., perform). It can also be argued that when a private person decides not to speak and has no duty to do so, it would be unconstitutional to require that person to speak or, contractual obligations aside, to punish him civilly for not speaking.
>
> The foregoing arguments can be focused on both of the certified questions. It can be offered that a person exercising constitutional rights who interferes with another's constitutional rights is not (Question 1) "interfering with the rights of another person by 'threats, intimidation, or coercion,' " within the meaning of G.L. c. 12, §§ 11H and 11I. It can be further offered by way of defense to an action under §§ 11H and 11I (Question 2) that the defendant was motivated by the "additional concern [ ]" of the

> artistic integrity of its production; that this motivation is within the defendant's free speech rights; and that this independent motivation, if established, is a complete defense to the action where it is also shown that the defendant had no personal wish either to punish the plaintiff or to intrude upon the plaintiff's rights.
>
> We have not considered any of the above arguments or issues in answering the two certified questions. We treat the questions as addressed to a typical action under the Massachusetts Civil Rights Act, which does not concern a defendant who is exercising a free speech or other constitutional right in interfering with the secured rights of another. In short, we answer the two questions as they are worded.

399 Mass. at 97, 502 N.E. 2d at 1377.

Although the Chief Justice was careful to frame most of the above observations as "offerings" or arguments, and to disregard these matters in supplying yes-or-no answers to the questions in the form we had posed them, we do not read his comments as mere speculation. On the contrary, the Chief Justice made plain that there might be no MCRA liability where a defendant is exercising its "free speech right" not to speak or perform. Either such liability would not be within the realm of behavior that the legislature intended to prohibit, or a constitutional defense might be offered to deny liability. The Chief Justice's opinion did not speak to the source of the constitutional defense, referring only to constitutional "free speech rights."

2. *The Concurrence*

The concurring Justices expressed a similar view in even more assertive terms. Justice Wilkins, joined by Justice Abrams, began his concurring opinion by noting that our questions were not "clear and unequivocal" but involved "substantial constitutional questions." 399 Mass. at 101, 502 N.E. 2d at 1380. He observed:

> Because the BSO's constitutional right to free speech under art. 16 of the Massachusetts Declaration of Rights is

present in this case, it may seem surprising to some that no question has been asked of us concerning the BSO's State constitutional right to determine not to perform "Oedipus Rex." Perhaps the Court of Appeals has already concluded that, if the nonconstitutional grounds indicated by its questions are not dispositive of Redgrave's claim, First Amendment considerations will be and that, therefore, it need not ask us about analogous State constitutional considerations.

I have been unable to think of any theory under which, in the circumstances, statutory liability may properly be imposed on the BSO in the face of its State constitutional right to determine what artistic performances it will or will not perform. Redgrave's constitutional rights[22] are no greater than those of the BSO, and there was no way in which the interests of each could be accommodated.

399 Mass. at 102, 502 N.E. 2d at 1380. Justices Wilkins and Abrams thus unequivocally expressed their view that article 16 of the Massachusetts Declaration of Rights creates a right not to speak or perform and thus bars MCRA liability in this case.

3. *The Dissent*

Finally, Justice O'Connor, joined in dissent by Justice Lynch, delved into the legislative history of the MCRA and found that, "beyond reasonable question," it was enacted in 1979 "in response to a concern about the inadequacy of then current law to deal generally with discrimination against minority groups, and more specifically, to deal with racial violence." 399 Mass. at 105, 502 N.E.2d at 1382. The dissenters concluded that "[r]acial discrimination and violence involve conduct that is specifically designed to interfere with secured rights, and it is

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22 We must interpret this reference to mean Redgrave's free speech right, emanating from the state constitution, but "secured "by the MCRA against private interference. The BSO's free speech right *under the state constitution*—that is, the right to speak, or not to speak, free of governmental interference—would, of course, outweigh Redgrave's merely statutory right under the MCRA, and would in Justice Wilkins' view bar the state from imposing MCRA liability.

that kind of conduct that the Legislature made the basis of civil liability." *Id.* They flatly asserted that the MCRA "is properly interpreted to provide for liability only when the defendant interferes with a plaintiff's secured rights with the specific intent to do so." 399 Mass. at 106, 502 N.E. 2d at 1382. Therefore, they concluded, unintentional interference with secured rights would not constitute interference by "threats, intimidation or coercion," as required by the statute. This abstract conclusion was rejected by the other five justices.

As an alternative ground for rejecting Redgrave's claim, the dissenters, in the last paragraph of their opinion, identified another reason why liability was inappropriate in this case even assuming that no specific intent to coerce was required under the statute. Cancellation of the performance, the dissenters explained, "may have conveyed a message to Redgrave that in the future other performances may be cancelled, but the conveyance of that message did not amount to threat or intimidation unless it suggested that the BSO itself intended to take future harmful action against her." 399 Mass. at 110, 502 N.E. 2d at 1385. The dissenters concluded that "[m]ere cancellation of the performances would not appear to convey the message that the BSO intended to take any future action." *Id.* Thus, there would be no threat or intimidation. This statutory construction, as applied to the facts of this case, was not addressed by any of the other justices, and there is no indication that any of them would have disputed the conclusion that liability could not attach in this case.

In reaching their conclusions, the dissenting Justices specifically noted that their statutory interpretation was based not only on legislative history and logic, but also was motivated "by another consideration." Justice O'Connor agreed that the plurality's answers to our certified questions implicated

> serious constitutional questions stemming from the BSO's constitutional right not to speak (i.e., perform), and not to be civilly liable for not speaking. Those constitutional questions are reduced or altogether removed by construing

> § 11I as imposing liability only on a defendant who specifically intends to interfere with another's secured rights.

399 Mass. at 106, 502 N.E.2d at 1382. Justice O'Connor reasoned that " 'It is our duty to construe statutes so as to avoid . . . constitutional difficulties, if reasonable principles of interpretation permit.' " *Id.* (quoting *Langone* v. *Secretary of the Commonwealth*, 388 Mass. 185, 190, 446 N.E.2d 43 (1983) (quoting in turn *School Comm. of Greenfield* v. *Greenfield Educ. Ass'n* 385 Mass. 70, 79, 431 N.E.2d 180 (1982))). In accordance with this principle, and keeping in mind that the BSO may have intended "only to exercise its constitutional right not to present an inartistic performance," 385 Mass. at 103, 502 N.E. 2d at 1381, the dissenters construed the statute to preclude liability in the situation presented by this case.

C. *Making Sense of the Supreme Judicial Court's Opinions*

There are at least four votes on the SJC denying liability on state law grounds. The concurring justices would establish a state constitutional defense, and the dissenters would interpret the statute, in light of constitutional concerns, to prohibit liability in the first instance. These two grounds are separate and not inconsistent. Because a majority of the SJC would foreclose liability on state law grounds, it is unnecessary and improper for us to reach the federal constitutional issues.

We are, moreover, confident that the *entire* SJC would, if explicitly asked to decide the issue, concur with the finding of no liability on both state law grounds. First, we think that there would be unanimity on the dissenters' theory that the statute does not in the first instance impose liability for refusing to perform. The dissent explicitly held so on two separate grounds. One of those grounds was rejected by the rest of the court as a general holding, but not as it related to these specific facts. Indeed, the other justices rejected the dissent's view of "coercion" only on the abstract assumption that constitutional concerns were *not* implicated in a particular case; that is, they established third-party pressure as a source of coercion and thus liability in a typical MCRA case, without reaching the novel issues of statutory construction presented by the instant facts.

And none of the other justices rejected the dissent's alternative statutory interpretation in the final paragraph, which related specifically to the facts of *this case*.

It is not mere speculation to presume that the justices in the plurality also would deny liability on the facts of this case. In fact, the plurality opinion suggested that the statute could be construed, in light of constitutional concerns, to deny liability for cancellation of an artistic performance. On such a difficult question of statutory construction, regarding a fact situation far removed from the prototype envisioned by the legislature and implicating a plaintiff's free speech rather than equal protection rights, we think it clear that the plurality (and the concurring justices, for that matter) would interpret the statute so as to find that cancellation of a performance could not be the basis for MCRA liability.

Such a conclusion follows directly from the longstanding principle of statutory construction that " '[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional *but also grave doubts upon that score.*' " *Loriol* v. *Keene*, 343 Mass. 358, 363 (1961) (quoting *United States* v. *Jim Fuey Moy*, 241 U.S. 394, 401 (1916)) (emphasis supplied). *See also Frisby* v. *Schultz*, 108 S. Ct. 2495, 2501 (1988) ("well-established principle that statutes will be interpreted to avoid constitutional difficulties"). This principle has for many years been a paramount tenet of Massachusetts statutory construction. *See, e.g.*, *Spence* v. *Gormley*, 387 Mass. 258, 264 (1982); *Baird* v. *Attorney General*, 371 Mass. 741, 745 (1977); *Board of Appeals of Hanover* v. *Housing Appeals Comm.*, 363 Mass. 339, 364 (1973); *Opinions of the Justices to the Governor*, 361 Mass. 897, 901 (1972); *Worchester Cnty. Nat'l Bank* v. *Commissioner of Banks*, 340 Mass. 695, 701 (1960); *Ferguson* v. *Commissioner of Corporations and Taxation*, 316 Mass. 318, 322-24 (1944); *Kennedy* v. *Commissioner of Corporations and Taxation*, 256 Mass. 426, 430 (1926). The SJC has "traditionally . . . regarded the presence of a serious constitutional question under one interpretation of a statute to be a strong indication that a different possible interpretation of that statute should be adopted, if the constitutional issue can be avoided thereby." *Baird*, 371 Mass. at 745. Even where the SJC

is unpersuaded that constitutional infirmities are implicated, it "prefer[s] to read the statute in a way that will avoid constitutional doubts." *Spence*, 387 Mass. at 264. In light of this unassailable rule of statutory construction, we are certain that the remainder of the SJC would agree with the dissenters that the MCRA, *when construed in light of constitutional considerations*, does not impose liability for a refusal to perform an artistic work.

It is clear that all of the justices had at the very least grave doubts about the constitutionality of imposing MCRA liability on the BSO in this case. Without seeing *any* indication that a single justice would otherwise have construed the statute in this case, we conclude that at least a majority would follow the traditional presumption and construe the statute so as not to implicate the constitutional right, recognized by them all, to refuse to proceed with an artistic performance.

We are equally confident that a majority, if not all, of the justices, would agree with the concurrence that a state constitutional defense also bars liability. It cannot seriously be contended that the dissenting justices, who were willing explicitly to construe the statute so as to preclude liability, would not join in the concurrence's reasoning. Similarly, the plurality took great pains to acknowledge the possibility of a constitutional defense. While neither the dissent nor the plurality distinguished between possible state and federal sources, they declared the existence of the right to refrain from performing with such certainty that, were we to hold that the First Amendment created no such right, we are confident that they would find such a right in article 16 of the Massachusetts Declaration of Rights.

D. *The State Law Basis for the SJC's Opinions*

We think it is clear that the grounds relied upon by the concurrence and the dissent (each of which, we believe, would be adopted by a majority of the court), do in fact arise from consideration of state, rather than federal, law. The dissenting justices' view is that the statute does not contemplate liability under the facts of this case. The dissenters concluded, based on at least two separate theories, that cancellation of a perform-

ance could not constitute "interfere[nce] by threats, intimidation or coercion" of Redgrave's exercise of her "right" to speak freely. This follows from the responsibility to construe Massachusetts statutes so as to avoid possible constitutional doubts.

We next examine the concurring justices' alternative state law theory for denying liability—a state constitutional defense. We think that our dissenting brethren are mistaken when they assert that "[a]ny decision by the SJC that the BSO has a state constitutional defense to MCRA liability is virtually the same as, and indistinguishable from, a ruling that the BSO has a federal constitutional defense." *Infra* at 76. We note that Justice Wilkins is himself the author of a careful and scholarly study of the relationship between federal constitutional provisions and parallel provisions of the Massachusetts constitution. *See* Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 Suffolk U.L. Rev. 887 (1980). In that article he discusses in detail the Supreme Judicial Court's past treatment of article 16 and the future prospects for construing article 16 as divergent from the First Amendment. *See id.* at 897-906. In addition, the SJC has itself found it appropriate in certain circumstances to read article 16 to provide greater protection for freedom of artistic expression than does the First Amendment. *See Commonwealth* v. *Sees*, 374 Mass. 532, 536-38, 373 N.E.2d 1151, 1155-56 (1978) (finding protection under article 16 for semi-nude dancing that is not protected by the First Amendment—*compare Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932-33 (1975)). *Accord Cabaret Enterprises, Inc.* v . *Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 468 N.E.2d 612 (1984) (nude dancing). *See also Commonwealth* v. *Upton*, 394 Mass. 363, 372, 476 N.E.2d 548, 555 (1985) (reaffirming *Sees*, and, noting that "[t]he Constitution of the Commonwealth preceded and is independent of the Constitution of the United States," listing numerous cases where the two constitutions have been read to diverge). We do not take lightly Justice Wilkins's express reliance on the existence of a state, as opposed to federal, constitutional right. We read his concur-

rence as a measured and meaningful conclusion that there is such a state constitutional right.

Nor does *Michigan* v. *Long*, 463 U.S. 1032 (1983), compel us to treat the SJC's constitutional views as reflecting exclusively, or primarily, federal constitutional law. *Michigan* v. *Long* addressed the prototypical case where a state court cites a mix of federal and state cases as authority for a "constitutional" holding. In that sort of case, the Supreme Court, on direct review of the federal questions, is legitimately concerned about the precedential impact of ambiguity on *federal* decisional law; the *Michigan* v. *Long* rule is devised to prevent unnecessary erosion of federal constitutional law through opaque state court rulings. But in the case before us, we defer to a state court's interpretation of *state* constitutional law on certification in a diversity case.

We think it clear that the concurrence did rely on "adequate and independent state grounds," and we are confident that at least a majority of the SJC would join that position. The "plain statement" rule in *Michigan*, quoted at length by the dissent, makes it clear that federal review of such a decision would be inappropriate. The dissent quotes, but fails to emphasize, the Supreme Court's ruling that the state ruling is presumed to be based on federal law when that decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law . . . ." 463 U.S. at 1040. This prerequisite is not met here. Similarly in the next passage quoted by the dissent: there is federal jurisdiction to hear the federal claim "when it fairly appears that the state court rested its decision primarily on federal law." *Id.* at 1042. There is, of course, no appearance at all here that the concurrence or either of the other opinions from the SJC was referring to federal law when speaking about the BSO's constitutional right not to perform, and the concurrence explicitly makes reference to *state* constitutional law as the adequate and independent ground for denying liability.

It is not surprising that the various SJC opinions do not cite federal cases, not only because those opinions were tendered in response to questions about state law, but also because there are not any federal cases directly, or even closely, on point in such a strange fact situation and with such an unusual state statute. It

cannot plausibly be argued that the SJC's opinions say anything at all about federal law. The concerns of *Michigan* v. *Long* therefore are not implicated here.[23]

E. *Conclusion*

In these circumstances, and especially in view of our obligation to avoid the unnecessary decision of federal constitutional questions, we see no need to discuss the existence or content of a First Amendment right not to perform an artistic endeavor.

In sum, we decline to reach the federal constitutional issues not only to avoid the unnecessary resolution of very difficult and novel questions of constitutional law, but also to avoid an unnecessary disputation with a state court over the reach and intendment of a state statute. There are at least four, and as many as seven, votes on the SJC for denying MCRA liability for refusing to perform an artistic work. The four votes are based on separate yet not inconsistent interpretations of *state* law, even if federal constitutional concerns might animate those state law constructions. We are confident that each of the two state law theories would be accepted by a majority, if not all, of the court, because of the necessity of construing state statutes so as to avoid constitutional doubts. But even if the entire court was not so inclined, a majority has already declared that liability should not be imposed under state law.

Accordingly, we hold, in light of our understanding of state law, that the district court correctly entered judgment for the BSO on Redgrave's MCRA claim.

The judgment on the MCRA claim is affirmed and the judgment on the contract claim is vacated and remanded for entry

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23 Of course, *Michigan* v. *Long* does not in any way affect our decision to defer to the SJC's implicit interpretation of the *statute itself*, in light of constitutional doubts, to foreclose liability in the first instance. *See supra*, at 54-56. In so doing, we are respecting a state court's discernible reading of its own statute influenced by constitutional concerns. That these concerns might be regarding *federal* constitutional issues does not change the fact that the state court's decision is, exclusively, one of state statutory construction; there is no suggestion that any view about federal law is being decided.

of judgment for consequential damages to the extent approved herein. No costs.

BOWNES, *Circuit Judge*, with whom *Circuit Judge* SELYA joins, concurring in part and dissenting in part. Although I concur wholeheartedly in part II of the majority opinion concerning Redgrave's consequential contract damages claim, I cannot agree with the majority's treatment of Redgrave's claim under the Massachusetts Civil Rights Act (MCRA). Accordingly, I write separately.

In framing the terms of my disagreement, it is important to emphasize what the majority actually holds when it rebukes Redgrave's MCRA claim. The majority's opinion is *not* based on a federal constitutional defense to application of the MCRA against BSO. Notwithstanding that it spends eight pages discussing federal constitutional issues raised by the MCRA, *supra* at 41-48, the majority opinion—paradoxically—goes on to add that "we see no need to discuss the existence or content of a First Amendment right" for the BSO. *Supra* at 61. Rather, the majority purports to rest its decision solely on principles of Massachusetts state law gleaned from the answers to the two questions we certified to the Supreme Judicial Court (SJC). The result of this approach is that the majority allows a state court to bar Redgrave from recovering on essentially first amendment grounds without any independent review by a federal court.

The majority's reading of the SJC's opinions is ill-founded and wholly unconvincing. It ignores the clear and unequivocal answers to the two questions certified to the SJC, relying instead on dicta in the SJC plurality opinion, it unduly emphasizes the concurring opinion by two justices, and it engrafts onto the plurality and concurring opinions selected statements from the dissent. Then, to hold this pastiche together, it overrules, on the basis of a law review article by one of the associate justices of the SJC, well-established Massachusetts law holding that, as far as freedom of speech is concerned, state and federal rights are coextensive. Not only has the majority ignored the dictates of *Michigan* v. *Long*, 463 U.S. 1032 (1983), it has rewritten Massachusetts law. This is comity run amok.

I. THE OPINIONS OF THE SUPREME JUDICIAL COURT

Unlike the majority, I do not believe that state law provides a basis for ducking the important and difficult federal constitutional issues raised by this case. Before turning to those issues, however, it is necessary first to examine what the SJC wrote in its answers to the questions certified by this court and how these answers ought to be interpreted in light of state and federal law. My discussion of the SJC's opinions is divided into two parts. The first part reviews what the SJC actually said about the scope of the MCRA and the second part applies a common sense approach concerning the import of possible defenses under the Declaration of Rights of the Massachusetts Constitution.

A. *What the Supreme Judicial Court Said*

Because this case involves certified questions, I begin by reviewing the answers supplied by the SJC. I first point out that with respect to the answers as opposed to any dicta, there is no need to distinguish between the plurality opinion on behalf of three justices and the concurrence on behalf of two: the two concurring justices specifically joined "in the answers given to the questions as the Chief Justice's [plurality] opinion has construed them." *Redgrave* v. *Boston Symphony Orchestra*, 399 Mass. 93, 101, 502 N.E.2d 1375, 1380 (1987) (Wilkins, J., concurring). A clear majority (five justices) of the SJC thus has agreed to a single answer to each of the certified questions. Each answer was favorable to the claims of Redgrave. They may be summarized as follows.

First, a defendant may be held liable under the MCRA even if the defendant did not desire to interfere with the rights of another, but merely acquiesced to third-party pressure. *See* 399 Mass. at 98-100, 502 N.E.2d at 1378-79. Second, it is no defense to an action under the MCRA that the defendant's actions were motivated independently by concerns for economic loss or physical safety, absent explicit and imminent danger of physical harm. *See* 399 Mass. at 100-101, 502 N.E.2d at 1379-80. The logical result of these answers, seemingly lost in the majority

opinion, is that the MCRA *was* intended to reach precisely the conduct of the BSO in this case. The only *statutory* defenses offered by the BSO—that it merely acquiesced to third-party pressure and acted out of an independent concern for economic loss and physical safety—were soundly rejected.[24]

The three justices in the plurality and the two concurring justices were not, however, in complete agreement, as evidenced by their separate opinions. Their disagreement lay in a possible state constitutional defense for the BSO, a question which is implicitly raised by the facts of this case, but which was never certified to the SJC. The three justices in the plurality concluded that the constitutional issue was not before them and limited their answers to "the two questions as they are worded." 399 Mass. at 97, 502 N.E.2d at 1377. They specifically stated that they were "express[ing] no opinion" on such issues as a free speech defense for the BSO. *Id.* In contrast, the two concurring justices found that BSO's free speech rights were inseparably involved in the case and thus did reach the question of state constitutional defenses. For himself and Justice Abrams, Justice Wilkins wrote: "I have been unable to think of any theory under which, in the circumstances, statutory liability may properly be imposed on the BSO in the face of its State constitutional right to determine what artistic performances it will or will not perform." 399 Mass. at 102, 502 N.E.2d at 1380.

The two dissenting justices differed fundamentally from both the plurality and concurring justices on the question of how to interpret the MCRA. The dissenters argued that the statute must be understood to require a showing of specific intent, applying only to persons who specifically intend to interfere with secured rights of another. 399 Mass. at 102-09, 502 N.E.2d at 1380-84. Like the plurality, the dissenters did not decide whether the BSO has any state constitutional defense to the MCRA, although the dissent did use the possibility of some

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24 The majority stresses another possible statutory defense which it borrows from dicta in the SJC dissent. This argument was not, however, put forward by any party to this case and must be rejected at any rate for the reasons set forth *infra* at 73-74.

"constitutional" problems—not specifying the federal or state Constitution as the source for such problems—as support for its interpretation of the statute. Invoking the familiar maxim of statutory construction, the dissent argued that the MCRA should be interpreted to require specific intent so as to avoid "serious constitutional questions" that would otherwise arise. 399 Mass. at 106, 502 N.E.2d at 1382.

A plain reading of the SJC's opinions reveals two things. First, a majority of five justices has rejected the statutory defenses offered by the BSO. Two justices dissented on this point, but we are, of course, bound to accept the conclusions of the majority and assume that the BSO's statutory defenses to the MCRA are not valid. Second, the two concurring justices reached the question of whether the BSO has any constitutional defense. They found that it did, under the state Constitution. However, a majority of five justices—the plurality of three plus the two dissenting justices—expressly declined to decide the constitutional question. This court is, therefore, left without definitive guidance from the SJC on that issue and must, I believe, decide both the state and federal constitutional questions in order to resolve fully the issues presented by this case.

The majority of this court obviously views the situation quite differently. It has put forth what are apparently three separate reasons for evading the constitutional questions and "deferring" to the views of the SJC on ostensibly state law grounds. Each argument is without merit. I address them individually.

First, by aggregating the views of the two dissenting and two concurring justices, the majority suggests that "[t]here are at least four votes on the SJC denying liability on state law grounds," making it "unnecessary and improper for us to reach the constitutional issues." *Supra* at 54. It is true that four members of the SJC would not have held the BSO liable under the MCRA. The two dissenters found that the MCRA did not extend liability absent specific intent to interfere with secured rights, and the two concurring justices found a state constitutional defense. Therefore, had this exact case arisen in the Massachusetts state courts and proceeded in its present form to the SJC, the BSO would not have been subjected to liability, by virtue of the somewhat unusual combined effect of two *minority*

positions. But that possibility is simply irrelevant to the issues here, because this case did not arise in the state courts, it arose in the federal courts. As a federal court sitting in a diversity case, our task is to apply the substantive law of Massachusetts on any given state law question, not to predict what quirky result might obtain in the state courts because a particular case contains multiple state law issues, each of which attracts a minority as well as a majority position.

The central state law issues in this case are the two questions of statutory interpretation we certified to the SJC. On those questions, we have received clear answers from a majority of five justices. That two justices disagreed with the majority's analysis should have no bearing on our handling of this case, for their view, however interesting it may be, failed to carry the day in the SJC. Certainly we have no business combining the two dissenting votes with the votes of the two concurring justices, who based their position on entirely different grounds and indeed explicitly rejected the dissent's analysis. In its eagerness to "defer" to the SJC, the majority of this court has confused the procedure of certifying questions of state law to a state court with the procedure of certifying entire cases to state courts. Federal courts do not certify cases to state courts. They certify questions of law and then apply the answers to those questions to reach a result which represents the combined effect of majority, not minority, positions.[25]

The second reason offered by the majority for ducking the federal issues in this case is its "confiden[ce] that a majority, if not all, of the justices [of the SJC], would agree with the concurrence that a state constitutional defense also bars liability." *Supra* at 57. One would expect such a conclusion to be based on

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25 General application of the majority's head-counting approach would produce equally inconsistent and anomalous results in other cases. In deciding cases involving multiple issues of Massachusetts law, federal courts in this circuit would be free to comb the volumes of Massachusetts Reports until they found sufficient dissenting votes from different justices on some combination of issues to produce a "majority." Hypothesizing that the case actually arose in state court, the federal court could then apply its constructed "majority" of dissents even though its resulting decision ran counter to the result that would be produced if the court applied the majority position on each issue. Such a situation obviously would be intolerable.

a substantive review of SJC decisions in the free speech area. Surprisingly, however, the majority bases its "confidence" solely a reading of the three SJC opinions in this case, only one of which (the concurring opinion) even purported to reach the issue of the state Constitution. It is, therefore, necessary to review the SJC opinions in some detail in order to see how the majority could have reached such a remarkable conclusion.

Writing for a plurality of the SJC, Chief Justice Hennessey addressed the question of a possible constitutional defense, which he termed "serious issues . . . suggested by the record of this case," in prefatory remarks preceding his answer to the two certified questions. 399 Mass. at 97, 502 N.E.2d at 1377. This court's majority opinion quotes liberally from these remarks, concluding that they "declar[e] the existence of the right to refrain from performing with . . . certainty." *Supra* at 57. I cannot agree.

To begin with, although the majority extensively quotes and discusses the plurality's "serious issues" remarks, it inexplicably omits the crucial paragraph with which these remarks are introduced and which places them in proper perspective: "We answer the two certified questions in accordance with their clear and unequivocal wording. In so doing, we *express no opinion* on some serious issues which are not addressed in the questions but which are suggested by the record of the case." 399 Mass. at 97, 502 N.E.2d at 1377 (emphasis added). I cannot imagine how to read this passage, except as indicating that, although the plurality felt compelled to mention some issues raised by the certified questions—including the question of a constitutional defense—it did not wish even to state an opinion as to how those issues might be resolved. The majority's opinion subverts these clear words of the Chief Justice by reading into the Chief Justice's opinion a view that the opinion itself expressly declined to take.

Moreover, if the plurality's intent *not* to take a position on the question of a constitutional defense was not made clear in its prefatory remarks, it is amply demonstrated by the language used by the Chief Justice to discuss the "serious issues." Each remark he made, to which the court today attaches overriding significance, is phrased as an "offering," a possible "infer-

ence," or an "argument," not as an opinion or a conclusion. *See* 399 Mass. at 97, 502 N.E.2d at 1377 ("It *can* be inferred . . . . [I]t *can* be argued . . . . It *can* also be argued . . . . It *can* be offered . . . . It *can* be further offered . . . .") (emphasis added). These comments are pure hypothetical conjecture and equivocation. They do not even rise to the level of dicta because they are not statements of *opinion* regarding issues not before the court. They are merely recitations of arguments that might be made (concerning issues not before the court), without any indication whether the justices in the plurality indeed thought that the arguments were valid. The plurality deliberately narrowed the focus of both questions, particularly question two, by stating immediately after the remarks: "We have not considered any of the above arguments or issues in answering the two certified questions." *Id.* The justices of the Supreme Judicial Court know how to offer an opinion, even in dicta, when they choose to do so. This court's attempt to elevate the plurality's comments into rulings of law binding on us ignores its expressed intent not to issue such rulings in this case.

It is also important to note that Justice Wilkins' decision to reach the question of defenses under the Massachusetts Constitution was the *sole* reason for his filing a separate concurrence. In every other respect, he agreed with the analysis of the plurality. *See* 399 Mass. at 101-02, 502 N.E.2d at 1380. By suggesting that *both* the plurality and concurrence "would" have found a state constitutional defense to the MCRA in this case, *supra* at 57, the majority of this court attempts to read out of existence the one and only distinction between the two SJC opinions. Notwithstanding that the five justices found sufficient disagreement amongst themselves to warrant two separate opinions, this court declares that the justices were actually in total agreement concerning a constitutional defense. This dovetailing of the plurality and concurring opinions is achieved by wresting the justices' words out of the context in which they were used.

As if it were not presumptuous enough to have disregarded the stated ground for disagreement between the plurality and concurring justices, the majority of this court goes on to create "unanimity" on the part of the SJC by declaring that the dissenters as well "would" have joined in the concurring justices'

finding of a state constitutional defense. *Supra* at 57. The dissent certainly says no such thing explicitly. No constitutional cases are cited by the dissent. Indeed, the dissent's only reference to any constitution was its assertion that interpreting the MCRA to require a showing of specific intent *avoided* "serious constitutional questions." 399 Mass. at 106, 502 N.E.2d at 1382. This court's majority opinion pays lip service to this principle of statutory construction, but then overlooks the central point of the dissenting justices' opinion. When the dissent said it was construing the MCRA to avoid constitutional questions, it was doing precisely that: avoiding the constitutional question, not deciding it. It is only by ignoring the very words of the dissent, and inverting the maxim of statutory construction invoked by the dissent, that the majority of this court purports to find within the SJC dissent a *resolution* of the constitutional question.

For its third reason to justify avoiding the federal issues in this case, the majority latches on to dictum in the dissent from the SJC. In this dictum, the dissenters identified an additional possible statutory defense for the BSO, namely, that "merely" cancelling the performance was not "threats, intimidation or coercion" within the meaning of the MCRA. *See* 399 Mass. at 110, 502 N.E.2d 1385; *supra* at 52-53. Importantly, this argument was not articulated by any party to this case nor was it addressed in any fashion by either the plurality or the concurring justices of the SJC. It was simply a suggested theory, virtually an aside, presented in the last paragraph of the dissent. At that, the dissenting justices noted only that it was "doubtful" that the BSO's action amounted to "interference with secured rights by threats, intimidation or coercion." 399 Mass. at 110, 502 N.E.2d at 1385 (O'Connor, J., dissenting).

Nevertheless, the majority speculates that there "would" be "unanimity" on this theory. *Supra* at 54. The majority identifies no precedent of the SJC that supports such speculation. It merely points out that the SJC, like all courts, normally construes statutes so as to avoid constitutional difficulties and also notes that "none of the other justices rejected" the dissent's "novel" statutory argument. *Id.* I think it obvious that this important issue of statutory construction cannot stand on such

a flimsy foundation. To begin with, I can ascribe no significance to the fact that the plurality and concurring justices failed to reject this argument given that no party ever raised the issue and it was not even the basis for the dissent. More fundamentally, I think that the majority's facile interpretation of the statute is absolutely untenable as applied to the facts of this case. The BSO did not "merely" cancel a performance, it cancelled an employment contract with Redgrave—essentially fired her—on the basis of community reaction to her political beliefs. In so doing, the BSO substantially undermined Redgrave's ability to obtain other work, as evidenced by the fact that this court has affirmed an award to Redgrave of $12,000 in consequential contract damages. *See* part II *supra*. Even if they do not amount to "threats" or "intimidation," I fail to see how the BSO's actions, affecting Redgrave's fundamental right to work, can be characterized as other than "coercive" within the meaning of the MCRA.

In sum, I do not agree with the majority's selective reading of the SJC's opinions. I find no basis in those opinions for rejecting Redgrave's claims on state law grounds. Accordingly, I move on to consider the issues *not* resolved by the SJC: possible defenses for the BSO under the Massachusetts Declaration of Rights and the United States Constitution.

B. *Application of the Massachusetts Declaration of Rights*

Although the issue of a possible state constitutional defense for the BSO was not reached by a majority of the SJC, it remains (at least potentially) an important question in this case. For, if the Massachusetts Declaration of Rights does provide an adequate and independent state law basis for precluding application of the MCRA to the BSO, we need not reach the question of a possible *federal* constitutional defense. The answer to this question is, however, as simple as it is important: insofar as freedom of speech is concerned, the Massachusetts and federal rights have previously been held to be coextensive. In the words of the SJC, "the criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . are equally appropriate to claims

brought under the cognate provisions of the Massachusetts Constitution." *Opinions of the Justices to the House of Representatives*, 387 Mass. 1201, 1202, 440 N.E.2d 1159, 1160 (1982) (quoting *Colo* v. *Treasurer & Receiver General*, 378 Mass. 550, 558, 392 N.E.2d 1195, 1200 (1979) (same holding)).[26]

To determine the breadth of constitutional free speech defenses in Massachusetts, then, we need only construe the federal Constitution itself and we will have our answer. Moreover, because Massachusetts has chosen to base the interpretation of its own free speech rights on analogous federal rights, as a federal court we cannot avoid construing the federal Constitution even if we could find a state court opinion directly on point. Any decision by the SJC that the BSO has a state constitutional defense to MCRA liability is virtually the same as, and indistinguishable from, a ruling that the BSO has a *federal* constitutional defense. Such a state court interpretation of federal law is, of course, not binding authority on the federal courts.

The majority opinion attempts to evade the impact of this point by referring to a law review article by Justice Wilkins, who wrote the concurring opinion in the SJC. Justice Wilkins' article discusses generally the relationship between the United States Constitution and the Massachusetts Declaration of Rights and, among other things, it explores "the *future prospects* for construing [the Massachusetts free speech guarantees] as divergent from the First Amendment." *Supra* at 58 (emphasis added). Based solely on this law review commentary, the majority says it feels confident that when Justice Wilkins referred to the Declaration of Rights in his concurrence, he conclusively signalled that the Massachusetts Constitution was to be interpreted as different from the United States Constitution. I do not agree. The principle that Massachusetts and federal free speech rights are coextensive is a firmly established one,

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26 This paralleling of federal and state law with respect to constitutional defenses mirrors the fact that the MCRA itself is patterned after and essentially coextensive with federal law. *See Redgrave*, 399 Mass. at 98, 502 N.E.2d at 1378 ("The remedy provided in [the MCRA] is coextensive with the remedy provided by Federal law by means of 42 U.S.C. § 1983 (1982), except that the State statute does not condition the availability of the remedy on state action.") (plurality opinion).

noted in many opinions of the SJC. *See, e.g.*, cases cited *supra* at 75. It has never seriously been questioned in any SJC opinion.[27] This principle leads to the inescapable presumption that whenever the SJC rules on the state constitutional right to free speech, it is also ruling on the first amendment. The extrajudicial commentary of a single justice does not alter this presumption. If anything, Justice Wilkins' law review article demonstrates a familiarity with past SJC practice such that if he had wanted to depart from the established rule, he would have done so explicitly.

In discussing its own jurisdiction in *Michigan* v. *Long*, 463 U.S. 1032 (1983), the Supreme Court also explored the inter-

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27 The majority has cited three SJC cases in an effort to demonstrate that the SJC has, "in certain circumstances," interpreted the Massachusetts free speech guarantees as divergent from federal rights. *Supra* at 58. The cases, however, do not support that proposition. One of the cases, *Commonwealth* v. *Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985), is actually a fourth amendment search and seizure case and has nothing to do with free speech rights. The other two cases, *Cabaret Enterprises, Inc.* v. *Alcoholic Beverages Control Comm'n*, 393 Mass. 13, 468 N.E.2d 612 (1984), and *Commonwealth* v. *Sees*, 374 Mass. 532, 536-38, 373 N.E.2d 1151 (1978), do involve free speech rights, but do not constitute breaks from the Supreme Court's interpretation of the first amendment

Both cases involve nude dancing, an activity which is treated as protected expression under both the state and federal constitutions. *See Schad* v. *Borough of Mount Emphraim*, 452 U.S. 61 (1981); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *Cabaret Enterprises, supra*; *Sees, supra*. Federal and state law regarding nude dancing varies only in that under the *twenty-first amendment* to the United States Constitution, federal courts must allow states "broad powers . . . to regulate the sale of liquor, [including the right to] ban [nude] dancing as part of [their] liquor license program." *Doran*, 422 U.S. at 932-33. By contrast, "no provision of [the Massachusetts] Constitution gives a preferred position to regulation of alcoholic beverages" and so nude dancing retains its full panoply of constitutional free speech protections even if performed on premises licensed to serve alcohol. *Sees*, 374 Mass. at 537, 373 N.E.2d at 1155.

Neither *Sees* nor *Cabaret Enterprises*, therefore, represents a departure from the established principle that the SJC will follow Supreme Court *first amendment* precedent in deciding free speech claims under the Massachusetts Constitution. They merely evidence the fact that, unlike the Massachusetts Constitution, the federal Constitution has a twenty-first amendment as well as a first amendment. This case, of course, involves no liquor-regulating issues and so the *Sees/Cabaret Enterprises* distinction is clearly inapplicable.

play between analogous state and federal constitutional guarantees, and developed a firm rule to be applied by federal courts in determining whether a state court decision rests on "adequate and independent state grounds" such that federal review would be inappropriate. As the Court noted, the "adequate and independent state courts, as well as avoidance of rendering advisory opinions." *Id.* at 1040. It provides that where there is no dispositive issue of federal law, the federal courts will not disturb state court rulings. The aplication of the doctrine has not, however, always been easy. The problem confronted by the *Long* court was this: state constitutional rulings often do not make clear whether the basis for the ruling is the federal Constitution or an independent provision of the state constitution. Prior to *Long*, such ambiguity had lead to a series of inconsistent and "unsatisfactory" "ad hoc" decisions by the Court. *Id.* at 1039. Thus, in *Long*, the "plain statement" rule was set down:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is *not clear from the face of the opinion*, we will accept as the most reasonable explanation that the state court decided the way it did because it believed that federal law required it to do so.
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> [Thus,] in determining . . . whether . . . to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is *not clear from the opinion itself* that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Id. at 1040-42 (citations omitted) (emphasis added).

As I have already stated, I believe that neither the SJC plurality opinion nor the dissent can fairly be read to have decided or opined on any constitutional issue. However, even assuming that all three opinions suggested a constitutional ruling, *none* satisfies the *Long* plain statement test and *none*, therefore, justifies the majority's evasion of the federal constitutional issues

raised. With respect to the plurality and the dissent, this court's majority opinion itself notes that neither "distinguished between possible state and federal sources." *Supra* at 57. To the extent those opinions have any constitutional dimension, they are precisely the kind of "opaque" state court rulings that *Long* was intended to address. *See supra* at 60.

The majority attempts to overcome this facial violation of the plain statement rule through its "confidence" that the plurality and dissenting justices "would" decide this case on state constitutional grounds if that issue were presented to them. *Supra* at 60. Speculation about what the SJC "would" decide does not, however, a plain statement make, and without a plain statement that the justices intended to rely independently on the Massachusetts Constitution, we *must*, under *Long*, assume that the justices were relying on the federal Constitution.

The opinion of the two concurring justices presents a somewhat more difficult question with respect to the plain statement rule because it did rely on the Massachusetts Constitution without explicitly referencing the federal Constitution. As previously noted, however, in invoking the Massachusetts Declaration of Rights, the concurring justices expressed no intent to depart from the established rule that state free speech rights are identical to and based on federal rights. Their opinion, therefore, does not provide "independent grounds" as required by *Long*.[28]

Overall, the majority has read between the lines of the SJC's three opinions, ferreted out a constitutional ruling where none was intended, and then blindly deferred to that ruling in the complete absence of any plain statement of adequate and independent state grounds.[29] This flouts the compelling logic and binding precedent of *Long*.

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28 Even if the concurring justices had stated that, contrary to prior practice, their state constitutional ruling was independent of the federal Constitution, their opinion represents the views of only two members of the SJC. The remaining majority of five justices concededly found no independent ground.

29 Strangely, in arguing that the SJC's opinions did rest on adequate and independent state grounds, the majority makes much of the fact that

The ultimate irony in this manipulative reading of the SJC's opinions lies in its purported justification: faithfulness to "principles of comity and federalism." *Supra* at 40. Certainly, the process whereby federal courts certify doubtful questions of state law to state courts can "save time, energy, resources and hel[p] build a cooperative judicial federalism." *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974). And where, as here, a state court delivers a definite answer to a question of state law which has been put to it, in the interest of comity that answer is normally conclusive in federal court. Even a *definite* answer to a question of state law *not* explicitly certified is welcome and entitled to considerable deference. But such principles simply are not involved in the extraordinary action taken by this court today. Not only does the majority of this court ignore the direct answers supplied by the SJC to the questions we certified, it finds controlling a question of law that was never even reached by a majority of the SJC.

The root of the problem presented by the majority's handling of this case, I believe, lies not with any error by the SJC, but with a mistake by the original panel in this case (which included me). When we certified our two questions to the SJC, we erred by not framing questions that were complete enough and broad enough in scope to elicit definitive answers from the SJC on all relevant, unresolved questions of Massachusetts law. But rather than admitting this error, and certifying new questions to the SJC, the majority now compounds our mistake by entering into a guessing game about what the SJC "would" have done if we *had* certified sufficiently broad questions. The majority opinion is riddled with terms of speculation, actually using the word "would" more than twenty times to describe what the SJC "would" decide *if* all the state law issues had been put squarely before it.

The majority's opinion amounts to nothing more than a prediction, a "hunch," based on comments, or at best dicta, con-

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none of the opinions explicitly mentioned the federal Constitution. *Supra* at 60. Of course, five of the justices failed to mention the state Constitution as well—eschewing any constitutional ruling—because no constitutional issue had been certified to the SJC for resolution in the first place.

tained in the SJC's opinions, that the SJC "would" decide the question of constitutional law raised by this case in favor of the BSO and that the state constitutional ruling "would" be independent from the federal Constitution. This approach turns comity on its head, and makes a mockery of the certification process.

Far from deferring to state court prerogative, the majority's action places a federal court in the position of itself deciding a delicate and unresolved question of state law. In so doing, the court disregards the words of the SJC's answers to the certified questions by reading into those answers a view the SJC expressly declined to adopt. And, to make matters worse, the court has resolved the state law issues in a manner that actually constitutes a *break* with existing state court precedent. Today, the United States Court of Appeals for the First Circuit effectively makes itself the first court ever to hold, as a matter of state law, that free speech rights under the Massachusetts Constitution are *not* based on federal court interpretations of the first amendment.

This concludes my reasons for disagreeing with the majority's interpretation of the SJC opinions. My opinion cannot, however, end here. In order to fully resolve the issues of the case, and to demonstrate why the *result* reached by the majority is wrong, I must discuss whether the BSO has a first amendment defense that blocks application of the MCRA.

II. THE FIRST AMENDMENT "ARTISTIC INTEGRITY" DEFENSE

The next issue, therefore, is whether the BSO has, as it asserts, a first amendment "artistic integrity" defense to its violation of the MCRA. Although the words "artistic integrity" evoke a positive response and sound as if they ought to come within the protective mantle of the first amendment, I have found no case explicitly recognizing a first amendment right of "artistic integrity." The term is hard to define. It can mean an actor's desire to perform a role as she wishes, the right of an artist to write, paint, or compose free of any outside restraints,

or a myriad of other activities involving artistic creation and expression. In the context of this case, however, and as articulated by the BSO, it means the right of the BSO to refuse to perform *Oedipus Rex* under less than optimal audience conditions. I recognize that the BSO has a first amendment right to control its artistic expression but, like every other first amendment right, this one is not an absolute.

The MCRA provides a cause of action against "any person or persons, whether or not acting under color of law, [who] interfere by threats, intimidation of coercion" with the free speech rights of another. Redgrave argues that the BSO's refusal to perform with her as narrator was motivated, as it clearly was, by the public outcry over her open endorsement of the Palestine Liberation Organization (PLO). She claims that she was deprived of employment because of her political views and that this deprivation amounted to coercion. The SJC agreed, rejecting the BSO's proffered statutory defenses to MCRA liability.

This case thus presents a clash between Redgrave's right under the MCRA not to be punished for her public espousal of unpopular political views, and the BSO's asserted first amendment right to control its artistic expression. It requires the application of a standard approach to first amendment issues: the balancing of two competing rights. In a number of recent cases, the Supreme Court has considered similar challenges to state antidiscrimination laws that, like the MCRA, incidentally infringe the right to free speech. Under the Court's now well-established test, such laws survive so long as they are necessary to serve a compelling state interest that is unrelated to the suppression of ideas. *E.g.*, *Board of Directors of Rotary Int'l* v. *Rotary Club*, 107 S. Ct. 1940, 1947-48 (1987); *Roberts* v. *United States Jaycees*, 468 U.S. 609, 628 (1984).

In order to apply that test to this case, I begin by examining the MCRA and Massachusetts' interest in passing it. The effect of the MCRA in this case is to further the Commonwealth's interest in preventing the abridgement of speech. There can be no denying that this interest is substantial. Political speech, like the pro-PLO speech for which Redgrave has been made to suffer, is a particularly valuable and protected commodity. *See,*

e.g., *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). Neither the federal government nor the states may regulate such speech on the basis of its content absent a clear and present danger. *See Brandenburg* v. *Ohio*, 395 U.S. 444 (1969). And, unless accompanied by a present intent to overthrow the government and an actual likelihood of concrete harm, even subversive political speech is protected and may not be made the basis for discrimination by the government. *Id.* The Commonwealth has reinforced the centrality of these first amendment values by passing a statute that broadens the reach of free speech rights. By eliminating the state action requirement of 42 U.S.C. § 1983, the MCRA proscribes the abridgement of speech rights by private actors, such as the BSO, as well as by state actors, such as the Commonwealth itself.

The Supreme Court has noted that the states and the federal government have a compelling interest in eliminating invidious discrimination by private persons on the basis of race and sex. Consequently, it routinely has upheld statutes aimed at eradicating such discrimination, even though they have the incidental effect of abridging the first amendment rights of the discriminators. *E.g.*, *New York State Club Ass'n* v. *City of New York*, 108 S. Ct. 2225 (1988); *Rotary Int'l*, 107 S. Ct. 1940; *Roberts*, 468 U.S. 609; *Bob Jones University* v. *United States*, 461 U.S. 574 (1983).[30] I believe that a similar analysis should be applied to the MCRA, which, among other things, prohibits discrimination on the basis of speech or politics.

Branding it "an unusual statute," however, the majority attempts to distinguish the MCRA from "traditional" statutes such as Title VII, which forbid racial and gender discrimination. *Supra* at 41. The majority declares that it "makes sense to treat private individuals similarly to the state" in order to combat racial discrimination. *Id.* On the other hand, it does not

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30 The majority cites the *New York State Club Ass'n* and *Roberts* cases for the proposition that "discrimination might in some circumstances be justified in order to preserve expressive integrity," *supra* at 43 n.17, but neglects to mention that its cited proposition and the remarks it quotes are merely dicta. In both cases, by overwhelming majorities, the Court upheld the challenged statute and dismissed the first amendment argument.

"make sense" to the majority to accord similar treatment to individuals who discriminate on the basis of political speech. The majority asserts that, unlike the right to be free from racial discrimination, the right to free speech "traditionally has content only in relation to state action . . . . The right *is* to be free of state regulation." *Id.*

I am at a loss to understand the majority's position except as the "common sense" of federal judges so wedded to "traditional" thinking that they simply refuse to accept the basis for Massachusetts' innovative antidiscrimination law. Certainly it is not true that the right to be free from racial discrimination is by definition less dependent on state action than the right to be free from restraints on speech. Even today, a primary legal guarantee against racial discrimination in this country is the equal protection clause of the fourteenth amendment which, of course, applies only to state action. Moreover, prior to the civil rights revolution of the 1960s, many Americans, including federal judges, thought that it did not "make sense," even through legislation, to extend that antidiscrimination mandate to private persons. *See, e.g., Civil Rights Cases*, 109 U.S. 3 (1883) (holding that public accommodations such as railroads and hotels were immune from federal legislation aimed at racial discrimination because they did not involve state action).

It is also important to note that the first amendment's free speech guarantee textually applies to action by the federal government alone.[31] It is the fourteenth amendment's due process guarantee which extends to individuals a federal right to free speech enforceable against the states. *Gitlow* v. *New York*, 268 U.S. 652, 666 (1925). Therefore, insofar as action by *states* is concerned, the same amendment—the fourteenth amendment—provides individuals with both their right to free speech and their right to be free from invidious racial discrimination. How, then, can the majority argue that the free speech right is inherently more dependent on state action than the antidiscrimination right?

Virtually all antidiscrimination rights, whether they pertain to discrimination on the basis of race, sex or political belief,

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31 "*Congress* shall make no law . . . abridging the freedom of speech, or of the press." U.S. Const., Amend. I (emphasis added).

find their "traditional" basis in constitutional guarantees which are limited to state action. However, just as Congress through Title VII extended rights against racial discrimination to encompass actions by private persons, so has Massachusetts through the MCRA extended protection to persons like Redgrave whose free speech rights are abridged by private persons. Certainly, laws against racial discrimination have a somewhat more established track record than the Redgrave's use of the MCRA, but I find particularly repugnant the majority's assertion that because Redgrave's claim is innovative, it does not "make sense."

Turning to the constitutional rights aspect of the balancing equation, the BSO argues, in its defense, that its own interest in interpreting and presenting *Oedipus Rex* as it wishes precludes liability to Redgrave under the MCRA. It asserts that the cancellation of her contract, in response to threats of audience disruption arising out of a disagreement with her prior political expression, was a legitimate means of maintaining artistic control over the production and did not give rise to liability under the MCRA.

It is necessary to state what the BSO has *not* alleged. The BSO has never claimed that it cancelled the contract with Redgrave as a symbolic act meant to communicate its disapproval of the PLO. Indeed, this court unanimously has rejected the idea that the BSO's firing of Redgrave intended to be any kind of symbolic speech or "statement." *Supra* at 17. Had the BSO intended to communicate such expression, we would be confronted by a more difficult case, with a conflict between two compelling speech interests: that of Redgrave to be free, under the MCRA, of economic retaliation by an employer for her views on matters of significant public import, and that of the BSO to be free, under the first amendment, of state encroachment on its right to express itself on those same matters.

In fact, the district court found, and it seems beyond dispute, that the BSO cancelled its contract with Redgrave out of concerns stemming from the potential for disruption during her narration. As the BSO acknowledges and as the record explicitly reveals, BSO agents feared disruption because they received

threatening telephone calls from persons protesting the engagement on political grounds:

> One caller . . . stated that there would be "bloodshed and violence" at Symphony Hall if Redgrave appeared. Other callers promised "trouble," and some stated that the Redgrave engagement would "haunt" the Symphony, that Redgrave should perish, and that the Symphony would "mourn." The persons at the Symphony who received these calls were alarmed and frightened.

BSO Opening Brief at 7. In the words of one BSO agent, "it was the reaction against her politics that was the problem."

The only possible conclusion to be drawn from this record and from the findings of the district court is that the BSO cancelled its contract with Redgrave in acquiescence to pressure from persons who disagreed with her political views and who, therefore, sought to retaliate against her. The BSO's asserted first amendment right, then, was not an independent artistic judgment to cancel the performance of *Oedipus Rex* but an instance of caving in to third-party pressure. The BSO, by doing so, effectively has blacklisted Redgrave.

The Supreme Court previously has held that fear of community reaction is no defense to an action for discrimination on the basis of race. *See Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984) ("The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Buchanan* v. *Warley*, 245 U.S. 60, 81 (1917) (similar). The BSO argues that in this case the acquiescence to third-party pressure was justified by the necessity of protecting the artistic integrity of its own performance. The BSO's musical director, Seiji Ozawa, testified to his belief that, if police were in the audience, the performers could not concentrate, and that, if somebody shouted or booed, the performance might not be able to continue. The artistic administrator, Bernell, referred to the possibility of police lining the halls as a threat to "artistic integrity." The BSO president, Darling, remembered a conversation in which Ozawa commented that the presence of security forces would change the artistic format of the performance.

By invoking a broad-based defense in the name of "artistic integrity," the BSO is, in essence, asserting a right to unlimited discretion in the presentation of its work. "Artistic integrity," as the BSO defines it, means the absolute and unrestricted power to determine everything about the performance—from the choice of the production to the hiring of performers, to the quality of the audience ambience. The effect of allowing such a defense would be that the BSO itself would determine when the MCRA would and would not apply simply by deciding what is "artistic" and what is not. Under the rubric of "artistic integrity," the BSO could insulate itself from any but the most superficial legal scrutiny.

The very breadth of this proposed defense renders it suspect. Although I recognize that the BSO does have a first amendment right to control its artistic expression, I do not believe that this right is so broad and so absolute as to outweigh Massachusetts' interest in protecting Redgrave's rights. *Cf. Kovacs* v. *Cooper*, 336 U.S. 77, 88 (1949) ("To enforce freedom of speech in disregard of the rights of others would be harsh and arbitrary in itself."). Neither the majority of this court nor the BSO seriously has suggested that Massachusetts does not have a compelling state interest in enacting legislation to protect the free speech rights of citizens in the Commonwealth. Nor has anyone argued that the MCRA does not represent the least restrictive means of achieving that purpose. Rather, the BSO asserts an absolute right against *any* infringement of its artistic expression. Under established Supreme Court precedent, it is clear that this argument must be rejected.

In *Board of Directors of Rotary Int'l* v. *Rotary Club*, 107 S. Ct. 1940 (1987), Rotary International asserted that an absolute right of free association and expression under the first amendment immunized it from a California statute prohibiting discrimination on the basis of sex. The Court rejected Rotary International's claim, noting that even if the California act did "work some slight infringement on Rotary members' right of expressive association, that infringement is justified because it serves the State's compelling interest in eliminating discrimination against women." Id. at 1947; see also *Roberts* v. *United States Jaycees*. 468 U.S. 609 (1984) (rejecting a similar chal-

lenge by the United States Jaycees to a Minnesota antidiscrimination statute). This holding was recently reaffirmed in *New York State Club Ass'n* v. *City of New York*. 108 S. Ct. 2225 (1988), where the Supreme Court rejected a facial challenge to a New York City ordinance prohibiting discrimination in certain private clubs. I believe these cases conclusively establish that the BSO's claim to absolute first amendment immunity from state antidiscrimination laws is contrary to governing constitutional precedent.[32]

If the Commonwealth were attempting to dictate how *Oedipus Rex* should be presented, an entirely different case would be presented. Such an extreme and probably unjustifiable exercise of state power would almost certainly be a violation of the first amendment. Here, however, the Massachusetts statute does not take control of the production away from the BSO. It merely holds the BSO to its own previously and voluntarily adopted contractual obligations. The BSO is still free to interpret and perform *Oedipus Rex* as it chooses. The only constraint imposed upon the BSO by operation of the MCRA is that the BSO cannot cancel the performance in reaction to anticipated audience disruption.

History and experience teach that the risk of catcalls, boos, disruptions, and even being the target of vegetable projectiles is

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32 The majority has turned the BSO's absolutist first amendment claim on its head, instead suggesting that in order to apply the MCRA to the BSO, this court would have to adopt the absolutist position that there could *never* be a first amendment defense to the BSO. The majority thus marches out a "parade of horribles," asserting that under my interpretation of the MCRA, the statute would be used to control the editorial practices of newspapers. *Supra* at 42, 48 n.21. This far-fetched hypothetical, however, demonstrates that the majority has missed the point. First amendment claims are not made of absolutes, they involve the balancing of competing interests. Each case must be judged on its own specific facts, and I am more than willing to concede that certain applications of the MCRA, including the majority's newspaper hypothetical, would be plainly impermissible under the first amendment. *See New York State Club Ass'n*, 108 S. Ct. at 2233-35 (noting that there might be applications of the New York City ordinance that would be unconstitutional, but adding that such cases must be considered on their own facts); Coffin, *Judicial Balancing: The Protean Scales of Justice*, 63 N.Y.U. L. Rev. 16 (1988) (a thoughtful espousal of careful, open and detailed judicial balancing in constitutional civil rights cases).

inherent in any public performance by artists who seek to entertain and/or educate the public. Indeed, it could be argued that the audience has a first amendment right to object vociferously to an artistic performance. The record in this case contains a strong dissent from Peter Sellars, the stage director hired by the BSO for the production, to Ozawa's opinion that the presence of police or expressions of displeasure by the audience would affect adversely the BSO's performance. Sellars testified that there is a "rich history of disruption" in the history of musical concerts and that, rather than shocking, "it is an important part of the concert to have a strong audience reaction." He pointed out that at the first performance of Stravinsky's *Rites of Spring*, "there were riots [and] the audience was stampeding." But Sellars went even further. He stated that "music has a responsibility to incite and is very exciting in this way." He believed that, far from disrupting the performance, the presence of police officers in Symphony Hall could be incorporated into the drama of *Oedipus Rex*. Sellars declared that the political tensions surrounding Redgrave's performance could result in a "living recreation" or even a "living creation" of the moral essence of the drama of *Oedipus Rex*.

To recognize an absolute first amendment defense of "artistic integrity," as the BSO urges, would flout the very values that the first amendment and the MCRA protect. It would mean that a performing artist, or group of artists, could deny another artist her statutorily protected right to perform because of fear that the audience might interrupt the performance. This is the opposite of "artistic integrity"; it allows the audience to dictate who shall perform and what shall be played. "Artistic integrity" under this view would be a license for the heckler's veto in the arena of artistic expression.

But perhaps the strongest illustration of the weakness of the BSO's asserted absolute first amendment defense lies in examining the potentially nightmarish consequences of recognizing it. If the first amendment extends absolute protection to the BSO when it fired Redgrave in response to public outcry over her political views, why would it not also protect the BSO in caving in to public views about her sex, her race, or her religion? If, in another case, the BSO refused to hire a Black per-

former because it felt that protests by bigots would be so intense as to compromise the BSO's "artistic integrity," then the Black performer should have a cause of action under the MCRA against the BSO for infringing her rights under the equal protection clause and any analogous state constitutional provisions banning race discrimination. But the "artistic integrity" defense would impose a fatal barrier to the application of the MCRA. And there is no reason to assume that the same defense would not also extend to other institutions, such as newspapers and universities, that engage generally in first amendment activity. In order to qualify for protection, these institutions would only need to characterize their discriminatory acts as based on artistic or intellectual choices and thus effectively foreclose legislative or judicial scrutiny.

Ironically, the BSO conceded at oral argument that the first amendment would not protect it from liability for race or sex discrimination. But its attempt to portray laws against race or sex discrimination as having deeper historical roots than laws against discrimination on the basis of political views is not only doctrinally unsound, but historically incorrect. The first amendment, and not the equal protection clause, is the long-standing tradition. The passage of the equal protection clause, and its concomitant application to Blacks came over one hundred years after the passage of the Bill of Rights. And the application of the equal protection clause to women is too recent to characterize as anything short of an innovation.

In conclusion, it is important to point out that the elimination of the state action requirement by the MCRA puts the BSO in the place of the state. Of course, the BSO retains its first amendment rights against the Commonwealth. But now, by operation of the MCRA, it also has obligations like those of the Commonwealth itself not to abridge the free speech rights of others. In cancelling its contract with Redgrave, the BSO repudiated that obligation and thwarted the Commonwealth's compelling interest in preventing the abridgement of speech.

I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 85-1305

VANESSA REDGRAVE and VANESSA REDGRAVE ENTERPRISES, LTD.,

Plaintiffs, Appellants,

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Defendant, Appellee.

No. 85-1341

VANESSA REDGRAVE and VANESSA REDGRAVE ENTERPRISES, INC.,

Plaintiffs, Appellees,

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Defendant, Appellant.

JUDGMENT

Entered: August 31, 1988 These causes came on to be heard on petition for rehearing en banc, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows:

The judgment on the MCRA claim is affirmed and the judgment on the contract claim is vacated and remanded to the district court for entry of judgment for consequental damages to the extent approved in the opinion filed this date.

No costs.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Kornstein, Sullivan, Geller, Klipp, Burling and Ms. Arnwine]

UNITED STATES COURT OF APPEALS
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—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

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No. 85-1341

VANESSA REDGRAVE and VANESSA REDGRAVE ENTERPRISES, LTD.,

Plaintiffs, Appellees,

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Defendant, Appellant.

Before:

Coffin, Bownes, Breyer, Torruella and Selya,
Circuit Judges.

ORDER OF COURT

Entered: September 20, 1988 Treating the "Motion of Plaintiffs-Appellants for Rehearing and For Certification of Issues to the Massachusetts Supreme Judicial Court", as a motion for leave to file the same,

It is ordered that said motion be, and the same hereby is, denied.

By the Court:

FRANCIS P. SCIGLIANO
Clerk.

[cc: Messrs: Kornstein, Sullivan, Geller, Klipp, Burling and Ms. Arnwine]

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* Judge Campbell is recused.

UNITED STATES COURT OF APPEALS
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No. 85-1305

VANESSA REDGRAVE and
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Plaintiffs, Appellants,

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Plaintiffs, Appellees,

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BOSTON SYMPHONY ORCHESTRA, INC.,

Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Robert E. Keeton, *U.S. District Judge*]

Before

COFFIN, BOWNES and SELYA,
Circuit Judges.

Daniel J. Kornstein with whom *Marvin Wexler* and *Kornstein Veisz & Wexler* were on brief for Vanessa Redgrave and Vanessa Redgrave Enterprises, Ltd.

David Alter, *Joseph Ferraro*, *Brian W. Guillorn* and *Shea & Gould* on brief for Screen Actors Guild, Inc., Amicus Curiae.

Robert P. Sherman, *Victoria A. Judson*, Lawyers' Committee For Civil Rights Under Law Of The Boston Bar Association, *F. Anthony Mooney*, *Susan G. Winkler*, *Hale & Dorr*, and *Marjorie Heins*, Massachusetts Civil Liberties Union Foundation, on brief for Lawyers' Committee For Civil Rights Under Law Of The Boston Bar Association and the Civil Liberties Union Of Massachusetts, Amici Curiae.

Robert E. Sullivan with whom *John T. Harding, Jr.*, *Cassandra Warshowsky*, *Palmer & Dodge*, *Keith C. Long* and *Nutter, McClennen & Fish* were on brief for Boston Symphony Orchestra, Inc.

Marvin N. Geller, *Thomas M. Sobol* and *Brown, Rudnick, Freed & Gesmer* on brief for American Jewish Congress, Amicus Curiae.

October 14, 1987

COFFIN, *Circuit Judge.*

Vanessa Redgrave and Vanessa Redgrave Enterprises, Ltd. appeal from a district court ruling that set aside a jury award to appellants of $100,000 in consequential damages caused by the Boston Symphony Orchestra's breach of contract. Redgrave also appeals from the district court's finding that the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, §§ 11H-I, does not impose liability on a party for acquiescence to third party pressure.

We find, in Part I, that the district court erred in reversing the jury's award of consequential damages, but find that Redgrave has presented sufficient evidence to prove only $12,000 in consequential damages, minus certain expenses. In Part IIA, we report the response of the Massachusetts Supreme Judicial

Court to our certification questions that acquiescence to third party pressure is not a defense to an action under the Massachusetts Civil Rights Act. In Part IIB, a majority of the panel holds that the Boston Symphony Orchestra did not have, on the facts of this case, a First Amendment defense of artistic integrity. This writer dissents on this issue.

We vacate the judgment and remand for further proceedings.

PROCEDURAL HISTORY

In March 1982, the Boston Symphony Orchestra (BSO) engaged Vanessa Redgrave to narrate Stravinsky's *Oedipus Rex* in a series of concerts in Boston and New York. Following announcement of the engagement, BSO received calls from its subscribers and from community members protesting the engagement because of Redgrave's political support for the Palestine Liberation Organization and because of her views regarding the state of Israel. On or about April 1, 1982, the BSO cancelled its contract with Redgrave and its performances of *Oedipus Rex*.

Redgrave sued BSO for breach of contract and for violation of the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, §§ 11H-I. BSO argued at trial that the contract was rightfully cancelled because the cancellation was the result of "a cause or causes beyond the reasonable control" of BSO. In response to the civil rights claim, BSO agents testified that they had not cancelled the performances in order to punish Redgrave for her past speech or repress her future speech, but because it was felt that potential disruptions, given the community reaction, would implicate the physical safety of the audience and players and would detract from the artistic integrity of the production.

Following a sixteen-day trial, the jury found that BSO had wrongfully breached its contract with Redgrave. On that basis, the district court awarded Redgrave her stipulated performance fee of $27,500. The jury also found that BSO's cancellation had damaged Redgrave's career by causing loss of future professional opportunities and awarded Redgrave $100,000 in consequential damages. The district court found that the question

whether there was sufficient evidence to support a finding of $100,000 in consequential damages was a "close and debatable" one, but concluded that there was sufficient evidence to support the award. Nevertheless, the district court overturned the grant of consequential damages,[1] finding that a First Amendment right of freedom of speech was implicated by the theory of consequential damages advanced by Redgrave and that Redgrave had not met the strict standards required by the First Amendment for recovery of damages. *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1193-1203 (D. Mass. 1985).

Redgrave's civil rights claim was premised on the allegation that BSO had interfered, "by threats, intimidation, or coercion," with Redgrave's exercise of freedom of speech rights. Mass. Gen. L. ch. 12, §§ 11H-I. In response to special interrogatories, the jury found that BSO did not cancel the contract because of the disagreements of BSO agents with Redgrave's political views. The district court stated that this finding eliminated an"essential factual premise" of Redgrave's primary claim based on the civil rights act. 602 F. Supp. at 1192. Redgrave also argued that even if BSO agents had not themselves disagreed with Redgrave's political views and did not cancel the contract because they wished to punish her for past speech or to repress her future speech, BSO did cancel the contract in response to pressure from third parties who disagreed with and wished to repress Redgrave's speech. Redgrave contended that such acquiescence to third parties on the part of BSO made it liable under the Massachusetts Civil Rights Act. The district court concluded that acquiescence unaccompanied by express personal disagreement with Redgrave's views could not amount to the "threats, intimidation, or coercion" needed to establish a claim under the civil rights statute. 602 F. Supp. at 1192. The district court, therefore, rejected Redgrave's acquiescence theory and entered judgment in favor of the BSO on her civil rights claim.

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1 The court apparently submitted the factual question to the jury either before it decided the legal issue or to protect against the need for a retrial in the event of reversal on appeal.

Redgrave appeals from the district court's overturning of the jury's award on consequential damages and from the district court's entry of judgment against her on her claim under the Massachusetts Civil Rights Act.

I. THE BREACH OF CONTRACT CLAIM

A. *Consequential Damages for Loss of Professional Opportunities*

In response to special interrogatories, the jury found that BSO's cancellation of the *Oedipus Rex* concerts caused consequential harm to Redgrave's professional career and that this harm was a foreseeable consequence within the contemplation of the parties at the time they entered the contract. 602 F. Supp. at 1204. A threshold question is whether Massachusetts contract law allows the award of such consequential damages for harm to a claimant's professional career.

Redgrave's consequential damages claim is based on the proposition that a significant number of movie and theater offers that she would ordinarily have received in the years 1982 and following were in fact not offered to her as a result of BSO's cancellation in April 1982. BSO characterizes this claim as one for damage to Redgrave's reputation,[2] and argues that the recent Massachusetts state court decisions in *McCone* v. *New England Telephone & Telegraph Co.*, 393 Mass. 231, 471 N.E.2d 47 (1984) and *Daley* v. *Town of West Brookfield*, 19 Mass. App. Ct. 1019, 476 N.E.2d 980 (1985), establish that Massachusetts law does not permit plaintiffs in breach of contract actions to recover consequential damages for harm to reputation.

In *McCone* v . *New England Telephone & Telegraph Co.*, plaintiffs alleged that their employer's breach of an implied covenant of good faith had caused them loss of salary increases, loss of pension benefits, and "damage to their professional rep-

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2 BSO notes that Redgrave contended that "the cancellation, as communicated to other employers through the news media, harmed Vanessa Redgrave because it carried with it the message 'that Vanessa Redgrave was unemployable,' a claim for damage to Redgrave's reputation."

utations, disruption of their personal lives, and great pain of body and mind." 393 Mass. at 234 n.8. The Massachusetts Supreme Judicial Court held that the claims for damages to reputation and other emotional injury could not be sustained in the suit because "these additional damages are not contract damages." *Id.* In *Daley* v. *Town of West Brookfield*, a Massachusetts appellate court observed that "[d]amages for injury to reputation are usually not available in contract actions," noting that the rationale most often given is that "such damages are remote and not within the contemplation of the parties." 19 Mass. App. Ct. at 1019 n.1, 476 N.E.2d at 980 n.1.

BSO notes that Massachusetts is in agreement with virtually all other jurisdictions in holding that damages for reputation are not available in contract actions. *See, e.g., Volkswagen Interamericana. S.A.* v. *Rohlsen*, 360 F.2d 437, 446 (1st Cir.) (applying federal law), *cert. denied*, 385 U.S. 919 (1966); *Stancil* v. *Mergenthaler Linotype Co.*, 589 F. Supp. 78, 84-85 (D. Hawaii 1984); *O'Leary* v. *Sterling Extruder Corp.*, 533 F. Supp. 1205, 1209 (E.D. Wis. 1982); *Skagway City School Board* v. *Davis*, 543 P.2d 218, 225-27 (Alaska 1975); *Tousley* v. *Atlantic City Ambassador Hotel Corp.*, 25 N.J. Misc. 88, 50 A.2d 472, 474-75 (N.J. Sup. Ct. 1947). This impressive line of cases, however, is less impressive for our purposes when the reasoning in these cases is analyzed with reference to the particular claim put forth by Redgrave.

In cases which have analyzed the reasons for disallowing a contract claim for reputation damages, courts have identified two determinative factors. First, courts have observed that attempting to calculate damages for injury to reputation is "unduly speculative." *Skagway City School Board*, 543 P.2d at 225. *See O'Leary*, 533 F. Supp. at 1209; *Tousley*, 50 A.2d at 474-75. In many cases, the courts have viewed the claims for damages to reputation as analogous to claims for physical or emotional distress and have noted the difficulty in ascertaining such damages for contract purposes. *See, e.g., Westwater* v. *Rector, Warden and Vestry of Grace Church*, 140 Cal. 339, 342, 73 P. 1055 (1903) ("Damages to health, reputation, or feelings are not clearly ascertainable either in their nature or origin."). As the court in *Skagway* noted, an estimate of injury to

reputation "must rest upon a number of imprecise variables," including the causal connection between the breach of contract and the injury to reputation and the amount by which any future earnings would be decreased by causes other than the breach. *Skagway City School Board*, 543 P.2d at 225.

The second factor that courts identify is that damages for injury to reputation "cannot reasonably be presumed to have been within the contemplation of the parties when they entered into the contract." *Skagway City School Board*, 543 P.2d at 225. These courts state that the basic rule of *Hadley* v. *Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854), which requires that contract damages be of the kind that arise naturally from the breach of a contract or be of a kind that reasonably may have been in the contemplation of the parties when they entered the contract, cannot possibly be met in a claim for general damages to reputation occurring as the result of a breach of contract. *See Skagway City School Board*, 543 P.2d at 225; *O'Leary*, 533 F. Supp. at 1209-10; *Tousley*, 50 A.2d at 474-75; *Mastoras* v. *Chicago, Minneapolis & St. Paul R.R.*, 217 F. 153, 154 (W.D. Wash. 1914). The Massachusetts Supreme Judicial Court seems to have accepted this rationale as a legitimate one for disallowing claims for injury to reputation as a contract damage. *See Daley* v. *Town of West Brookfield*, 476 N.E.2d at 980 n.1 ("The rationale often given [for disallowing damages for injury to reputation in contract actions] is that such damages are remote and not within the contemplation of the parties."). *See also* 5 Corbin, *Contracts*, § 1007-11 at 70-87 (1964); 11 Williston, *Contracts*, § 1344 at 226-29 (1968) (discussing *Hadley* v. *Baxendale* general rule of consequential damages).

The claim advanced by Redgrave is significantly different, however, from a general claim of damage to reputation. Redgrave is not claiming that her general reputation as a professional actress has been tarnished by BSO's cancellation. Rather, she claims that a number of specific movie and theater performances that would have been offered to her in the usual course of events were not offered to her as a result of BSO's cancellation. This is the type of specific claim that, with appropriate evidence, can meet the *Hadley* v. *Baxendale* rule, as adopted by the Massachusetts Supreme Judicial Court in *John Hether-*

ington & Sons, Ltd. v. *William Firth Co.*, 210 Mass. 8, 21; 95 N.E. 961, 964 (1911) (in breach of contract, injured party receives compensation for any loss that follows as a natural consequence from the breach, was within the contemplation of reasonable parties as a probable result of breach, and may be computed by "rational methods upon a firm basis of facts"). As the district court correctly noted in a preliminary memorandum:

> [I]f plaintiffs proved other employers refused to hire Redgrave after termination of the BSO contract because of that termination (that loss of the other employment "followed as a natural consequence" from the termination of the contract), that this loss of other employment would reasonably have been foreseen by the parties at the time of contracting and at the time of termination, and that damages are rationally calculable, then plaintiffs may be entitled to damages that include monies for loss of the other employment. Although plaintiffs have a heavy burden to carry here, it cannot be said with certainty at this time that they will not be able to meet this burden.

Redgrave v. *BSO*, 557 F. Supp. 230, 234 (D. Mass. 1983).

The jury was given appropriate instructions to help it determine whether Redgrave had suffered consequential damages through loss of future professional opportunities. They were told to find that BSO's cancellation was a proximate cause of harm to Redgrave's professional career only if they determined that "harm would not have occurred but for the cancellation and that the harm was a natural and probable consequence of the cancellation." *Redgrave* v. *BSO*, 602 F. Supp. at 1211. In addition, they were told that damages should be allowed for consequential harm "only if the harm was a foreseeable consequence within the contemplation of the parties to the contract when it was made." *Id.* at 1212. In response to special interrogatories, the jury found that BSO's cancellation caused consequential harm to Redgrave's career and that the harm was a foreseeable consequence within the contemplation of the parties. 602 F. Supp. at 1204.

Although we find that Redgrave did not present sufficent evidence to establish that BSO's cancellation caused consequential harm to her professional career in the amount of $100,000, *see infra* pp. 19-29, we hold that, as a matter of law, a plaintiff may receive consequential damages if the plaintiff proves with sufficent evidence that a breach of contract was the proximate cause of the loss of identifiable professional opportunities. This type of claim is sufficiently different from a nonspecific allegation of damage to reputation that it falls outside the general rule that reputation damages are not an acceptable form of contract damage.

B. *First Amendment Restrictions*

The district court found that, although consequential damages for loss of professional opportunities could be a legitimate contract claim, it was required to overturn the jury's verdict of $100,000 because Redgrave had not met the strict standards required by the First Amendment for the recovery of such damages. According to the district court, the only theory that Redgrave could advance for establishing consequential damages necessarily implicated First Amendment concerns. As the court explained, "the only possible mechanism of harm to Redgrave's professional career, revealed by the evidence, is the alleged influence of some statement made by BSO on later decisions of others—a statement of fact or opinion implied in BSO's cancellation, or express or implied in BSO's press release." *Redgrave* v. *BSO*, 602 F. Supp. at 1197. In other words, "an inescapable element of the claimed causal connection between BSO's cancellation and consequential harm to Redgrave's professional career" was for "a factfinder [to] reasonably infer that others, upon receiving the news of BSO's cancellation, interpreted the cancellation as conveying a message about Redgrave." *Id.*

Having concluded that Redgrave's theory of consequential damages necessarily rested on the premise that BSO had conveyed a message about her to others, the district court felt it was required to apply heightened First Amendment scrutiny to any claim for damages stemming from such communicative activ-

ity.[3] The closest analogy the court found was the standard applied to allow damages in defamation cases. Thus, the court required that Redgrave show that "BSO has impliedly communicated to others some material issue of fact (and not merely opinion) about Redgrave that it knew to be false, or that BSO acted with reckless disregard for the truth or falsity of a material statement of fact it impliedly communicated." 602 F. Supp. at 1201. The court concluded that, in any message BSO could be said to have sent, no statement of fact could be disentangled from BSO's statements of opinion to which the jury could apply a "reckless falsity" test. Further, any statements of opinion by BSO would be absolutely protected under the First Amendment. *Id.* at 1201-03. Thus, the court found that Redgrave had not overcome the significant hurdles placed by the First Amendment before recovery of consequential damages.

The district court is correct in stating that an act can be a protected form of First Amendment activity. *See, e.g., NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) (economic boycott may be form of First Amendment activity); *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (contributing money is form of speech); *Cohen* v. *California*, 403 U.S. 15 (1971) (wearing sign on back of jacket is form of speech).

BSO's cancellation of its contract with Redgrave was not, however, an act intended to be a form of symbolic speech or a "statement" by BSO.[4] As BSO agents testified, the press release announcing BSO's cancellation went through a number of drafts in order to remove any statement or implication that Redgrave was too controversial or dangerous to hire. In fact,

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3 The district court found that state action would exist because it, as a court, would enter a judgment for such damages. 602 F. Supp. at 1199.

4 We are not convinced that the cancellation of a contract could ever receive First Amendment protection. Unlike engaging in an economic boycott, burning a draft card, or wearing an armband, cancelling a contract is not a traditional form of protest. We would be wary of adopting a principle that would allow a party wishing to breach its contract for economic objectives to hide behind First Amendment protections by merely stating that it has cancelled the contract in order to make a statement about the other party. This question, however, is not before us in this case.

the press release did not even refer to Redgrave by name.[5] Indeed, in response to special verdict question 11A, the jury found that BSO's cancellation and press release did not "impliedly state to others that BSO's managerial agents held the opinion that Vanessa Redgrave was so controversial because of her publicly expressed political views that the risks associated with the series of performances in Boston and New York, in which she was to appear as narrator, were too great to be acceptable to a prudently managed symphony orchestra." 602 F. Supp. at 1205. Thus, the evidence does not support an inference that the BSO intended its cancellation to act as a symbolic message to others.

An act not intended to be communicative does not acquire the stature of First-Amendment-protected expression merely because someone, upon learning of the act, might derive some message from it. Nor is such an act entitled to special protection merely because others speak about it. Accordingly, we believe the district court erred in reasoning that the causal link between the BSO's contract cancellation and Redgrave's harm necessarily involved protected expression by the BSO.

Redgrave's counsel put forth two distinct avenues of causation through which the jury could find that BSO's cancellation caused Redgrave consequential harm, and the jury was instructed on both grounds. Besides contending that BSO's cancellation and press release impliedly stated to others that Redgrave was too controversial to be acceptable to a prudently managed symphony orchestra, Redgrave also contended that "since BSO was a prestigious cultural organization, the very fact that it decided to cancel rather than proceed with performances in which Vanessa Redgrave was to appear would tend to influence others not to offer her future professional opportunities." *Redgrave* v. *BSO*, 602 F. Supp. at 1212. The jury was instructed to "determine whether the evidence supports either,

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5 It is true that, as a result of previous press reports regarding the community reaction to the Redgrave engagement, the public could easily infer that BSO's cancellation of the performances resulted from the furor over Redgrave. Nevertheless, the fact that the BSO made an intentional effort not to mention Redgrave by name in the press release indicates that the act of cancellation was not intended to be a form of expression.

both, or neither of these contentions" in deciding whether BSO's cancellation caused Redgrave consequential harm. *Id.*

The jury rejected the "implied message" theory yet still found that the BSO's contract cancellation caused Redgrave to lose future professional opportunities. Apparently, the jury felt that the BSO's cancellation had caused harm to Redgrave's career, despite its conclusion that BSO had not intentionally sent any implied message regarding Redgrave. Theodore Mann, a director, testified that he chose not to offer Redgrave a job in a theater performance because

> [t]he Boston Symphony Orchestra had canceled, terminated Ms. Redgrave's contract. This had a—this is the premier or one of the premier arts organizations in America who, like ourselves, seeks support from foundations, corporations, individuals; have subscribers; sell individual tickets. I was afraid . . . and those in my organization were afraid that this termination would have a negative effect on us if we hired her.

(A. 1302a.) Thus, the jury could appropriately have found that even though the BSO did not intend its contract cancellation to be a purposeful symbolic communication, other performing companies may have derived, or feared that their supporters might derive, some message from the cancellation, causing them concern about hiring Redgrave. Under this theory, the jury could have found that the act of cancellation, unprotected by the First Amendment, was the proximate cause of Redgrave's harm. The district court correctly stated that "plaintiffs must prove that in some way information about BSO's action was communicated to others." 602 F. Supp. at 1197. However, the trial court erred in confusing communication *about* the BSO's contract cancellation with the notion of an implied communication of a particular message *by* the BSO regarding Redgrave. Absent unusual circumstances suggesting primary interest in communicating an idea transcending the immediate act, a contract cancellation would not trigger the concerns ordinarily protected by the First Amendment. Indeed, under the district court's ruling, the cancellation of almost any contract with a notable figure could be effectively transformed into a

statement protected by the First Amendment, thereby unnecessarily diluting the protections intended by contract law. Thus, although Redgrave must meet the ordinary strict contract requirements for finding consequential damages, *see infra* pp. 19-20, no additional requirements need be imposed in this case because of the strictures of the First Amendment.

C. *Sufficiency of the Evidence*

The contract requirements for finding consequential damages are designed to ensure that a breaching party pays only those damages that have resulted from its breach. Thus, to receive consequential damages, the plaintiff must establish a "basis for an inference of fact" that the plaintiff has actually been damaged, Williston, *Contracts*, § 1345 at 231, and the factfinder must be able to compute the compensation "by rational methods upon a firm basis of facts." *John Hetherington & Sons*, 210 Mass. at 21, 95 N.E. at 964.

In analyzing the evidence presented by Redgrave on her claim for consequential damages, we are guided by the basic principle that the evidence must be viewed in the light most favorable to the plaintiff and that the plaintiff must be given " 'the benefit of every favorable inference that may be fairly drawn.' " *Borras* v. *Sea-Land Service, Inc.*, 586 F.2d 881, 885 (1st Cir. 1978) (quoting *Dumas* v. *MacLean*) 404 F.2d 1062, 1064 (1st Cir. 1968)). In examining the evidence, however, we must not neglect uncontradicted evidence offered by the defendant. *Layne* v. *Vinzant*, 657 F.2d 468, 472 (1st Cir. 1981); *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17, 19 (1st Cir. 1981). Further, the plaintiff is not entitled to "unreasonable inferences which rest on conjecture and speculation." *Carlson* v. *American Safety Equipment Corp.*, 528 F.2d 384, 386 (1st Cir. 1976); *See also Goldstein* v. *Kelleher*, 728 F.2d 32, 39 (1st Cir. 1984).

In order for Redgrave to prove that BSO's cancellation resulted in the loss of other professional opportunities, she must present sufficent facts for a jury reasonably to infer that Redgrave lost wages and professional opportunities subsequent to April 1982, that such losses were the result of BSO's cancel-

lation rather than the result of other, independent factors, and that damages for such losses are capable of being ascertained "by reference to some definite standard, either market value, established experience or direct inference from known circumstances." *John Hetherington & Sons*, 210 Mass. at 21, 95 N.E. at 964. During trial, evidence was presented regarding losses Redgrave allegedly suffered in film offers and American theater offers. Based on this testimony, the jury found that BSO's cancellation of its contract with Redgrave caused Redgrave $100,000 in consequential damages. We find that the evidence presented by Redgrave was not sufficent to support a finding of damages greater than $12,000, less expenses.

Most of Redgrave's annual earnings prior to April 1982 were derived from appearances in films and the English theater.[6] Redgrave presented evidence at trial that she earned more than $200,000 on the average since her company's fiscal year 1976 and she testified that she had a constant stream of offers from which she could choose films that had secure financial backing. After BSO's cancellation in April 1982, Redgrave contended, her career underwent a "startling turnabout." Redgrave testified that she did not work at all for the fourteen months following the cancellation and that the only offers she received during that time were for films with insufficent financial backing.

The evidence demonstrates that Redgrave accepted three firm film offers in the fourteen months following the BSO cancellation. If these three films had been produced, Redgrave would have earned $850,000 during that period. The first offer, for a film entitled *Annie's Coming Out*, was for a role in which Redgrave had expressed interest in February 1982, two months prior to the BSO cancellation. The offer for the role was made in July 1982, a short time after the BSO's cancellation, and was finalized in August 1982. The film was to be financed by Film Australia, a government production company, and no evidence was presented that Redgrave believed the film might experience

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6 Although Redgrave received a number of offers to appear in Broadway plays between 1975 and 1980, the only offer she accepted and received payment for was a 1976 play, Lady From the Sea. performed in off-Broadway's Circle in the Square theatre, for which Redgrave received $9,000.

financial difficulties. Redgrave's fee for the film was to be $250,000.

From July 1982 until approximately the end of October 1982, Redgrave believed that she would be filming *Annie's Coming Out* sometime during the fall.[7] Because of that commitment, Redgrave turned down other firm offers that had secure financial backing. These included an offer received in July 1982 to make a cameo appearance in a Monty Python film entitled *Yellowbeard*, for $10,000, and an offer received in September 1982 to star in the television film *Who Will Love My Children?*, for $150,000. In late October or early November 1982, Redgrave was informed that *Annie's Coming Out* would not be produced because of financial difficulties. No evidence was presented that the film's financial failure was related to the BSO cancellation.

In February 1983, Redgrave accepted an offer to appear in the film *No Alternatives*, for a fee of $350,000. Until June or July of 1983, Redgrave assumed that she would be filming *No Alternatives*. During that period, Redgrave turned down other offers, including an offer to appear in a film about Andre Sakharov, for a fee of $70,000.[8] In June or July of 1983, Redgrave was informed that *No Alternatives* would not be filmed because of financial difficulties. Redgrave received $25,000 as a forfeiture on the contract.

In June 1983, Redgrave accepted an offer to appear in a film entitled *Track 39*, for a fee of $250,000. This film fell through in late July 1983. There was no allegation that the financial failures of either *No Alternatives* or *Track 39* were directly related to the BSO cancellation.

Although there is no doubt that Redgrave did not have a successful financial year following the BSO cancellation, we cannot say that she presented sufficient evidence to prove that her

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7 Redgrave testified that the original departure date for Australia had been postponed from October 11 to November 2, and that she could not recall whether it was in late October or early November that she found out that the film had fallen through.

8 Redgrave testified that she turned down the offer for the Sakharov film because she got "alternative work" and because she was afraid the film might be used as anti-communist propaganda. There was no evidence that this film did not have secure financial backing.

financial difficulties were caused by the BSO cancellation. No evidence was presented that, at the time Redgrave accepted the offer for *Annie's Coming Out*, she believed the film would experience financial difficulties.[9] In addition, there was no allegation that the offers Redgrave turned down because of her commitment to *Annie's Coming Out*, such as offers to appear in *Yellowbeard* and *Who Will Love My Children?*, did not have firm financial backing. If *Annie's Coming Out* had been produced, Redgrave would have earned $250,000 in the year following the BSO cancellation—an amount equal to Redgrave's average earnings before April 1982.

Redgrave contends, however, that the film offers she received following the BSO cancellation lacked secure financial backing and were thus significantly different from offers she had received prior to the cancellation.[10] Thus, although Redgrave would have received $600,000 had *No Alternatives* and *Track 39* been produced, she argues that the fact that she had to accept two films that were ultimately not produced was itself a result of the BSO cancellation.

We have some doubt as to whether Redgrave presented sufficient evidence to prove that the type of film offers she received in the year following the BSO cancellation were radically different from the film offers received before the cancellation. On direct examination, Redgrave testified regarding her previous performances, starting from 1966. For most of the years, Redgrave testified solely regarding the work she did, rather than the offers she received, noting that she could only "remember what [she] actually did at the moment" and not the offers she had received. (A. 769.) Redgrave did testify that she received four film offers in 1980, none of which she accepted, and four film offers in 1981, two of which she accepted. No evidence was pre-

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9 In fact, Redgrave expressed an interest in filming *Annie's Coming Out* in February 1982, two months before the BSO cancellation.

10 We assume that Redgrave's claim must refer primarily to offers made after November 1982, when she learned that *Annie's Coming Out* would not be produced. Offers made before that time, which would have conflicted with the filming of *Annie*, presumably would not have been accepted by Redgrave in any case.

sented, however, regarding the financial backing of those films which were offered to Redgrave but which she did not accept. Thus, the evidence does not present an effective comparison between the type of film offers received before and after the BSO cancellation and we are left primarily with Redgrave's allegation that the film offers received in the two time periods were significantly different.

Even if we accept, however, that Redgrave proved she had experienced a drop in the quality of film offers following the BSO cancellation, Redgrave must also prove that the drop was proximately caused by the BSO cancellation and not by other, independent factors. Redgrave failed to carry her burden of presenting sufficient evidence that would allow a jury to reasonably to infer this causal connection.

The defense introduced evidence that Redgrave's political activities and statements had generated much media attention prior to the incident with the BSO. Redgrave conceded that her agents had informed her, prior to April 1982, that certain producers were hesitant to hire her because of the controversy she generated. (A. 930.) And, in a newspaper interview in February 1982, Redgrave stated that she "had lost a lot of work because of her political beliefs," but that every time there had been a move to stop her working, "an equally terrific response [came] forward condemning any witch hunts." (A.983.)

To the extent that Redgrave may have experienced a decline in the quality of film offers received subsequent to April 1982, that decline could have been the result of Redgrave's political views and not the result of BSO's cancellation.[11] Even if the cancellation highlighted for producers the potential problems in hiring Redgrave, it was Redgrave's burden to establish that, in some way, the cancellation itself caused the difference in film offers, rather than the problems as highlighted by the cancellation. Redgrave produced no direct evidence from film producers who were influenced by the cancellation. Thus, the

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11 In addition, immediately following the BSO cancellation, Redgrave stopped using the services of her long-term agent, Bruce Savan, and engaged the services of the William Morris agency. After one year, Redgrave reengaged Savan. BSO contends that the change in agencies could have been an additional factor causing any decline in offers.

jury's inference that the BSO cancellation had caused Redgrave consequential damages was one based more on "conjecture and speculation," *Carlson* v. *American Safety Equipment Corp.*, 528 F.2d at 386, than on a sufficient factual basis.

Redgrave also claims that BSO's cancellation caused a drop in her offers to perform on Broadway. Bruce Savan, Redgrave's agent, testified regarding all offers to perform in American theater that had been made to Redgrave prior to April 1982. The offers averaged from two to four plays in the years 1976-1980. There was no evidence of any offers to perform on Broadway made to Redgrave in 1981, the year immediately preceding the BSO cancellation. Redgrave accepted only one of the offers made during this time period, appearing in *Lady From the Sea* in off-Broadway's Circle in the Square theatre in 1976.

Redgrave contends that, as a result of the BSO cancellation, she no longer received offers to appear on Broadway. She testified that, in April 1983, she was appearing in a successful English theater production of *The Aspern Papers* and was led to believe by the producers that the show would move to New York. Although it was Redgrave's opinion that the reason the play did not move to Broadway was because of the "situation" caused by the BSO cancellation, there was no testimony from the producers or others as to why the production did not go to Broadway. Redgrave also testified that, in August 1983, she was asked by the Jujamson producers to appear in *The Abdication*, but that the play was never produced. Again, there was no testimony from the producers or others as to why the production did not materialize. In addition, Redgrave testified that Lillian Hellman had wished Redgrave to portray Hellman in a theater production on Broadway, but that Hellman was concerned about the BSO incident. Finally, Redgrave testified that Theodore Mann had considered offering her a role in *Heartbreak House* in Circle in the Square, but decided not to extend the offer because of the ramifications of the BSO cancellation.

Theodore Mann was the one producer who testified regarding his decision not to employ Redgrave in a dramatic production. When asked what had led to his decision, Mann testified, as we have earlier quoted, that he was afraid that patrons and sponsors of his organization would be negatively influenced by

the example of such a premier arts organization as the BSO, and added:

> And so we had conferences about this. We were also concerned about if there would be any physical disturbances to the performance . . . . And it was finally decided . . . that we would not hire [Redgrave] because of all the events that had happened, the cancellation by the Boston Symphony and the effects that we felt it would have on us by hiring her.

(A. 1302a.)

The evidence presented by Redgrave concerning her drop in Broadway offers after April 1982 is not sufficient to support a finding of consequential damages.[12] We do not, of course, question Redgrave's credibility in any way. Our concern is with the meager factual evidence. Redgrave had to introduce enough facts for a jury reasonably to infer that any drop in Broadway offers was proximately caused by the BSO cancellation and not by the fact that producers were independently concerned with the same factors that had motivated BSO. Mann's testimony itself reflects the fact that many producers in New York may have been hesitant about hiring Redgrave because of a feared drop in subscription support or problems of physical disturbances. Apart from Mann's testimony, Redgrave presented nothing other than the fact that three expected offers or productions did not materialize. This type of circumstantial evidence is not sufficient to support a finding of consequential damages.

In addition, we note that it would be difficult for any assessment of damages resulting from the lack of Broadway theater offers to meet the standard that damages must be "capable of ascertainment by reference to some definite standard, either

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12 We note that Redgrave's claim regarding American theater offers is both stronger and weaker than her claim regarding film offers. On the one hand, Redgrave indeed did not receive any Broadway offers in 1982, in contrast to various film offers and inquiries that she did not receive throughout 1982. On the other hand, Redgrave failed to present evidence of any Broadway offers made to her in 1981, weakening her assertion that a dramatic decline in such offers occurred subsequent to April 1982.

market value, established experience or direct inference from known circumstances." *John Hetherington & Sons*, 210 Mass. at 21, 95 N.E. at 964. *See Lowrie* v. *Castle*, 225 Mass. 37, 51-52, 113 N.E. 206 (1916); Williston, *Contracts*, § 1346 at 239-240. The three specific performances Redgrave referred to, other than Mann's, were never performed on Broadway and there is no indication of the amount of fees Redgrave would have received. In addition, Redgrave had accepted only one Broadway offer among the many she had received over the years because, according to Redgrave, the scripts were not good enough for her first Broadway appearance. There was no evidence that Redgrave would have necessarily accepted any Broadway offer made in 1982.

Mann's testimony regarding the production of *Heartbreak House* is the one piece of evidence from which reasonable fact finders could draw conflicting inferences and from which a reasonably ascertainable damage award could be granted. We therefore defer to the inferences drawn by the jury from that testimony and grant Redgrave damages on that basis.

Mann's testimony reveals that, in considering whether to hire Redgrave, he and his partners were concerned about losing support from foundations and subscribers, having difficulty selling tickets, and dealing with possible physical disruptions. These are factors that result from the community response to Redgrave's political views. They are the same factors that apparently motivated BSO to cancel its contract with Redgrave and are not the result of that cancellation. Thus, one could possibly infer from Mann's testimony that the BSO cancellation was not a proximate cause of the damage suffered by Redgrave in being denied the part in *Heartbreak House*.

Mann also testified, however, that he and his partners were affected by the BSO cancellation because BSO was a premier arts organization and was dependent on the same type of support as Circle in the Square. A jury could reasonably infer that BSO's cancellation did more than just highlight for Mann the potential problems that hiring Redgrave would cause but was actually a cause of Mann's decision, perhaps because Mann's theater support was similar to that of BSO or because Mann felt influenced to follow the example of a "premier arts organiza-

tion." Because this is a possible inference that a jury could draw from Mann's testimony, we defer to that inference. We therefore find that Redgrave presented sufficient evidence to prove consequential damages of $12,000, the fee arrangement contemplated by Mann for Redgrave's appearance in *Heartbreak House*, minus expenses she would have incurred had she appeared in the play.

BOWNES, *Circuit Judge*.[13]

II. THE MASSACHUSETTS CIVIL RIGHTS CLAIM

The Massachusetts Civil Rights Act (MCRA) creates a private cause of action for injunctive and other equitable relief, including damages, against "any person or persons, whether or not acting under color of law, [who] interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth." Mass. Gen. L. ch. 12, §§ 11H-I. Redgrave argued below that the BSO's contract cancellation interfered with her "secured" federal[14] and state[15] constitu-

13 All three members of the panel agree with the first part of the opinion written by Judge Coffin. Judge Selya concurs with this part of the opinion written by Judge Bownes. Judge Coffin's dissent to Part II of the opinion follows.

14 The first amendment guarantees that "Congress shall make no law. . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." This amendment is, of course, now applicable to state laws.

15 Article XVI of the Declaration of Rights to the Constitution of the Commonwealth guarantees that "[t]he right of free speech shall not be abridged."

Article XIX of the Massachusetts Declaration of Rights provides that "[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

tional rights to freedom of speech and association in violation of the MCRA. *See Bell* v. *Mazza*, 394 Mass. 176, 474 N.E.2d 1111 (1985) (explaining that rights against private persons are "secured constitutional rights" within the meaning of the MCRA regardless of whether the constitutional provisions from which they emanate apply only to government action). She argued that this was true whether the BSO cancelled the contract because its own agents disagreed with her political views and intended to punish her for past speech or repress her future speech, or whether the BSO cancelled the contract because it acquiesced to pressure from third parties who disagreed with her views and intended to punish her or chill her expression.

Both the jury and the district court found that the BSO did not cancel the contract because its own agents disagreed with Redgrave's political views. The court found, instead, that the BSO cancelled the performances out of concern that potential disruptions could jeopardize both the physical safety of the audience and players and the artistic integrity of the production. Neither fact finder imposed liability upon the BSO for cancelling the contract in acquiescence to third-party pressure, however, because the district court held that such acquiescence, unaccompanied by any intent of the BSO's agents to interfere with Redgrave's rights, was not actionable under the MCRA.

Because we felt that the scope and applicability of the Massachusetts Civil Rights Act to such a cancellation turned on a significant question of Massachusetts law on which we found no controlling precedent, we certified two questions of law to the Supreme Judicial Court of the Commonwealth pursuant to Supreme Judicial Rule 1:03:

> 1. Under the Massachusetts Civil Rights Act, Mass. Gen. Laws ch. 12, § 11H and § 11I, may a defendant be held liable for interfering with the rights of another person, by "threats, intimidation, or coercion", if the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights.

2. If a defendant can be held liable under the Massachusetts Civil Rights Act for acquiescence to third party pressure, is it a defense for the defendant to show that its actions were independently motivated by additional concerns, such as the threat of extensive economic loss, physical safety, or particular concerns affecting the defendant's course of business?

A. *The Opinion of the Supreme Judicial Court of Massachusetts*

The Supreme Judicial Court answered "Yes" to the first question. It held:

> Making an exemption for civil rights deprivations resulting from third-party pressure "would reward and encourage" the very conduct which the substantive statutes prohibit. *See Sarni Original Dry Cleaners, Inc.* v. *Cooke*, 388 Mass. 611, 618 n.7, 447 N.E.2d 1228 (1983). Whether the issue is phrased in terms of the existence of a specific intent requirement under the Massachusetts Civil Rights Act or a third-party pressure exemption from the statute recognizing such an exemption would tend to eviscerate the statute and defeat the legislative policies behind the statute. Persons seeking to interfere with the civil rights of others in violation of the statute may not know or believe that the interference may lead to civil or criminal liability. Thus, to be effective, the provisions of §§ 11H and 11I must apply to any threatening, intimidating, or coercive behavior regardless of whether the defendant specifically intended to interfere with a right to which the plaintiff is entitled. Accordingly, we answer "yes" to the first question.

Redgrave v. *Boston Symphony Orchestra*, 399 Mass. 93, 100, 502 N.E.2d 1375, 1379 (1987).

The second question was answered "No." The court held:

> As an abstract proposition, fear of business disruption, fear for economic loss, or fear for physical safety are not

> justifications under §§ 11H and 11I. The legislative intent would be negated if such defenses were permitted. *See Sarni Original Dry Cleaners, Inc.* v. *Cooke, supra.* In an analogous context, the Supreme Court has rejected the notion that private biases and injuries that may be inflicted as a result of such biases are permissible justifications for deprivations of constitutional rights. *Palmore* v. *Sidoti*, 466 U.S. 429, 104 S. Ct. 1879, 80 L.Ed.2d 421 (1984). Fear that the prejudice of third-party actors may lead to a breach of the peace has also been rejected as a justification for deprivations of civil rights. *Buchanan* v. *Warley*, 245 U.S. 60, 81, 38 S. Ct. 16, 20, 62 L.Ed. 149 (1917). We recognize that explicit and imminent danger of physical harm might well in some circumstances justify interference with an individual's civil rights (*cf. Bradenburg* v. *Ohio*, 395 U.S. 444, 447, 89 S. Ct. 1827, 1829, 23 L.Ed.2d 430 [1969]), but the certified question raises no such premise. Our answer to the second certified question is, "No."

399 Mass. at 101, 502 N.E.2d at 1379-80.

The answers to the questions would seem to decide the state law issue in favor of Redgrave. Redgrave's contract was cancelled because of pressure by her political opponents; this was "coercive behavior" that interfered with her exercise of a secured right. The opinion of the Supreme Judicial Court, however, suggests that the BSO might have a free speech defense based on "artistic integrity." In his opinion for the majority, Chief Justice Hennessey, in dictum, stated:

> It can be offered that a person exercising constitutional rights who interferes with another's constitutional rights is not (Question 1) "interfering with the rights of another person by 'threats, intimidation, or coercion,' " within the meaning of G.L. c. 12, §§ 11H and 11I. It can be further offered by way of defense to an action under §§ 11H and 11I (Question 2) that the defendant was motivated by the "additional concern[ ]" of *the artistic integrity* of its production; that this motivation is within the defendant's free speech rights; and that this independent motivation, if established, is a complete defense to the action where it is

> also shown that the defendant had no personal wish either to punish the plaintiff or to intrude upon the plaintiff's rights.

399 Mass. at 97, 502 N.E.2d at 1377 (emphasis added). Justice Wilkins, in a concurring opinion joined by Justice Abrams, stated:

> I have been unable to think of any theory under which, in the circumstances, statutory liability may properly be imposed on the BSO in the face of its State constitutional right to determine what artistic performances it will or will not perform. Redgrave's constitutional rights are no greater than those of the BSO, and there was no way in which the interests of each could be accommodated.

399 Mass. at 102, 502 N.E.2d at 1380.

Justice O'Connor, in a dissent joined by Justice Lynch, was of the opinion that the language of the state statute and its purpose was not to impose liability "on a defendant whose intentional conduct unintentionally causes interference with a plaintiff's secured right," but that a "plaintiff's right of recovery is contingent on a showing of the defendant's specific intent." 399 Mass. at 102, 502 N.E.2d at 1380.

Although we could properly decide the case on the basis of the Supreme Judicial Court's answers to our questions and ignore the "artistic integrity" dicta, we think that the issue should be addressed. Our decision to do so is prompted by the assumption of the Supreme Judicial Court that "artistic integrity" comes within the protective mantle of the first amendment to the United States Constitution.[16]

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16 We note that the right of free speech under the Massachusetts Declaration of Rights is coextensive with that under the first amendment. *Opinions of the Justices to the House of Representatives*, 387 Mass. 1201, 1202, 440 N.E.2d 1159, 1160 (1983) (citing *Colo* v. *Treasurer & Receiver Gen.*, 378 Mass. 550, 558, 392 N.E.2d 1195 (1979).

B. *The Artistic Integrity Defense*

In order to determine whether the BSO had a free speech artistic integrity right to cancel Redgrave's contract, we first look at the circumstances leading to the cancellation.

The district court found that the BSO cancelled its contract with Redgrave out of concerns stemming from the potential for disruption. As the BSO acknowledges and as the record explicitly reveals, BSO agents feared disruption because they received threatening calls from persons protesting the engagement on political grounds:

> One caller, who identified himself as Arthur Bernstein of the Jewish Defense League, stated that there would be "bloodshed and violence" at Symphony Hall if Redgrave appeared. Other callers promised "trouble," and some stated that the Redgrave engagement would "haunt" the Symphony, that Redgrave should perish, and that the Symphony would "mourn." The persons at the Symphony who received these calls were alarmed and frightened.

BSO Brief at 7 (citations omitted). In the words of one BSO agent, "it was the reaction against her politics that was the problem." (A. 1511(a).)

The only possible conclusion to be drawn from this record and from the findings of the district court is that the BSO cancelled its contract with Redgrave in acquiescence to pressure from persons who disagreed with Redgrave's political views and who, therefore, sought to retaliate against her.[17] There can also be no question that responding to such pressure by depriving Redgrave of her contractual right to work had the natural effect of chilling her exercise of her secured rights by "coercion." *See Redgrave*, 399 Mass. at 100, 502 N.E.2d at 1379.

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17 The American Jewish Congress in its capacity as Amicus Curiae argues that members of the public who voiced disapproval with the BSO's engagement of Redgrave were engaging in protected first amendment activity. Since these members of the public are not parties in this case, we express no view as to whether they could properly be subjected to liability under the MCRA for threatening Redgrave or BSO with violence or disruption.

The BSO argues that because it cancelled the contract in part out of concern for the physical safety of its audience and performers, the cancellation does not violate the MCRA. The Supreme Judicial Court has instructed that concern for safety stemming from less than "explicit and imminent danger of physical harm" is not a defense to liability under the MCRA, *Redgrave*, 399 Mass. at 101, 502 N.E.2d at 1379-80 (citing *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969)). Since the BSO does not argue that it acted in response to any explicit and imminent danger, we conclude that the BSO's concerns for public safety, though held in good faith, do not shield it from liability for interfering with Redgrave's secured constitutional rights.

The first question is what is meant by "artistic integrity" in the context of this case. The Supreme Judicial Court did not explicitly define the term; it may be inferred from its opinion that it means the right to refuse to perform.

The BSO asserts a "First Amendment right to maintain artistic control of its own stage—[a] right to determine the artistic statements it wants or does not want to make, and the standards of performance and quality it wishes to pursue." BSO supplemental brief at 13. If the state or local government were attempting to dictate to the BSO how *Oedipus Rex* should be performed, there might well be a first amendment violation. But that is not the case before us.[18]

What the BSO is really claiming first amendment protection for is the right to perform without interruption by the audience. The BSO's musical director, Seji Ozawa, testified to his belief that, if police were in the audience, the performers could not concentrate, and that, if somebody shouted or booed, the performance might not be able to continue. (A. 514a, 519a.) The artistic administrator, Bernell, also equated a problem of artis-

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18 Obviously, the dissent views this case from a different angle than we do. It equates, mistakenly we think, artistic integrity with congenial performance conditions. We do not believe that the MCRA can be construed in the context of this case as limiting the right of artists to refuse to perform. What the MCRA does is give an artist whose contracted performance has been cancelled because of her political views the right to seek redress against those who were responsible for the cancellation.

tic integrity with the police lining the halls. (A. 1506a.) The BSO president, Darling, remembered a conversation in which Ozawa commented that the presence of security forces would change the artistic format of the performance. (A. 1838a.)

No precedent has been cited by the BSO for extending first amendment protection to artistic integrity in this context, and we have been unable to find any. Although we can understand why the BSO would want its performance to be free from audience interruption,[19] we hold as a matter of law that the first amendment is not implicated. We do not think that any performing artist, or group of artists, has a first amendment right to perform without audience interruption and with due respect to the Supreme Judicial Court, we hold that, under the facts of this case, there is no first amendment artistic integrity defense under the MCRA.

History and experience teach that the risk of catcalls, boos, disruptions, and even being the target of vegetable projectiles is inherent in any public performance by artists who seek to entertain and/or educate the public. Indeed, it could be argued that the audience has a first amendment right to object vociferously to an artistic performance. The record in this case contains a strong dissent by Peter Sellars, the stage director hired by the BSO for the production, to Ozawa's opinion that the presence of police or expressions of displeasure by the audience would adversely affect the BSO's performance. Sellars testified that there is a "rich history of disruption" in the history of musical concerts and that, rather than shocking, "it is an important part of the concert to have a strong audience reaction." He pointed out that at the first performance of Stravinsky's *Rites of Spring*, "there were riots . . . and, you know, the audience was stampeding." But Sellars went even further. He stated that "music has a responsibility to incite and is very exciting in this way." He believed that, far from disrupting the performance, the presence of police officers in Symphony Hall could be incorporated into the drama of *Oedipus Rex*. Sellars declared

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19 Audience silence, except, of course, for expressions of approbation, would be appropriate for the proposed production which involved over 200 performing artists, dramatic effects dependent on selective lighting, modulated sound and silent intervals.

that the political tensions surrounding Redgrave's performance could result in a "living recreation" or even a "living creation" of the moral essence of the drama of *Oedipus Rex*. In Sellars' words,

> And I felt that far from eclipsing the music, in fact the music would be heard with greater intensity and people genuinely searching and questioning what its subject matter was than possibly any performance of it that had previously taken place since it was written . . . .

To recognize a first amendment defense of "artistic integrity" under the facts of this case would flout the very values that the first amendment and the MCRA protect. It would mean that a performing artist, or group of artists, could deny another artist her statutorily protected right to perform because of the fear that the audience might interrupt the performance. This is the opposite of "artistic integrity"; it allows the audience to dictate who shall perform and what shall be played. "Artistic integrity" under this view would be a license for a heckler's veto in the arena of artistic expression. Under Ozawa's approach to "artistic integrity," the *Rites of Spring* might well have been suppressed, depriving the audience—and perhaps the world—of Stravinsky's music. A police protected performance of *Oedipus Rex* with Redgrave as reader might not have resulted in an optimum performance by the BSO, but that is not the pivotal consideration here. Rather, the issue is whether an artistic performance may properly be held hostage by the passions and prejudices of the community.

The Supreme Judicial Court has held unequivocally that acquiesence to outside pressure is one of the harms that the MCRA was designed to prevent. *Redgrave*, 399 Mass. at 100, 502 N.E.2d at 1379. Allowing the defense of artistic integrity would withdraw the protection of the MCRA from artists, such as Redgrave, who openly espouse unpopular political views. The effect would be to give free rein to those seeking to intimidate artists engaging in political activity. Indeed, an artist-employer might even be able to claim an "artistic integrity

defense" in response to pressure from groups opposing a performer's *aesthetic* views.

The judgment below is vacated and the case remanded to the district court for (1) entry of judgment in favor of plaintiffs for consequential damages to the extent approved hereby, (2) reversal of the district court's order entering judgment for the BSO on the MCRA count, (3) consideration of the plaintiffs' claims for compensatory damages available under the MCRA and not included in the award of contract damages, *see* Mass. Gen. Laws ch. 12, § 11(I), and (4) an award of attorney's fees and costs as may be appropriate, *see id.*

Costs awarded to plaintiffs on appeal.

COFFIN, *Circuit Judge*, dissenting. I disagree with the majority's conclusion, in Part II, that the Boston Symphony Orchestra (BSO) does not have a First Amendment artistic integrity defense under the Massachusetts Civil Rights Act (MCRA). My disagreement is not with the majority's values and general principles, which are so well expressed, but with its focus: it is looking in the wrong direction and missing, I think, the main action.

I.

I agree wholeheartedly with the majority's determination that we should address what may, strictly, be dicta of the Massachusetts Supreme Judicial Court concerning the possible constitutional rights of the BSO at issue in this case. Indeed, under the particular circumstances of this case, I think we would be irresponsibly "turning a deaf ear" if we followed convention and confined ourselves to the guarded responses to our questions—which, it turns out, were less than complete.

A majority of the Supreme Judicial Court strongly suggested that the BSO exercised a "free speech right" when it cancelled its performances of *Oedipus Rex* and its concomitant contract with Redgrave. *Redgrave* v. *Boston Symphony Orchestra, Inc.*,

399 Mass. 93, 97, 502 N.E.2d 1375, 1377.[1] Assuming that to be true, they stated that the Massachusetts legislature would not have intended the MCRA to apply to the BSO in this case. *Id.* If we overlook these authoritative explications of state law by the Commonwealth's highest court, we risk imposing MCRA liability where the Massachusetts legislature did not intend it.

More importantly, if the BSO did in fact exercise a cognizable state or federal constitutional right when it cancelled its performances and its contract with Redgrave, then the Supreme Judicial Court's answers to our certified questions are inapplicable to this case. Following its discussion of the potential constitutional rights of the BSO at stake in this case, the court made clear that it treated our "questions as addressed to a typical action under the Massachusetts Civil Rights Act, which does *not* concern a defendant who is exercising a free speech or other constitutional right in interfering with the secured rights of another." *Id.* (emphasis added). By considering the constitutional issues that we overlooked in designing our certified questions, however, the Supreme Judidial Court offered complete answers to our otherwise incomplete questions.

These considerations, along with principles of comity and federalism, persuade me to listen very carefully to what is technically dicta in the Supreme Judicial Court's opinion. By so elevating substance over form, we take full advantage of the potential of the certification device as a means of conducting meaningful conversation between court systems.

II.

Discussing what it termed "serious issues" not addressed in our questions, the Supreme Judicial Court stated:

> It can be inferred from the record that the BSO was itself a victim of violations of G.L. c. 12, § 11H, by those persons who put pressure on the BSO to cancel the Red-

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1 The two concurring justices stated that the BSO has a "State constitutional right to determine what artistic performances it will or will not perform." *Redgrave*, 399 Mass. at 102, 502 N.E.2d at 1380.

> grave participation. From the premise that the BSO had the free speech right to perform or not as it saw fit, it can be argued that the BSO's secured rights were interfered with, and that it was not within the legislative intent that anyone should be punished under c. 12 for exercising the constitutional right not to speak (i.e., perform). It can also be argued that when a private person decides not to speak and has no duty to do so, it would be unconstitutional to require that person to speak or, contractual obligations aside, to punish him civilly for not speaking.

Redgrave v. *Boston Symphony Orchestra*, 399 Mass. at 97, 502 N.E.2d at 1377.

The court then went on to say what the majority has quoted, *supra* p. 36, effectively construing the MCRA as providing two barriers to the imposition of liability against the BSO in this case. First, if, in declining to perform *Oedipus Rex*, the BSO was exercising a "free speech" right, it cannot be held liable to Redgrave under the MCRA because the legislature did not intend the exercise of that right to constitute interference by "threats, intimidation, or coercion." Second, assuming that the BSO has a "free speech" right to control the "artistic integrity" of its production of *Oedipus Rex*, it has a "complete defense" to MCRA liability if, in cancelling its contract with Redgrave and its performances of *Oedipus Rex*, it was motivated by a concern for "the artistic integrity of its production."

While the Supreme Judicial Court suggests that this second barrier to liability is unavailable to a defendant who harbors a "personal wish to either punish the plaintiff or to intrude upon the plaintiff's rights," the jury found that the BSO did not intend to punish or intrude upon Redgrave's rights. *See Redgrave* v. *Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1192 (D. Mass. 1985). Thus, in the circumstances of this case, either barrier to MCRA liability is available to the BSO so long as it exercised constitutionally protected speech when it cancelled its performances of *Oedipus Rex* and its contract with Redgrave. It is to that question that I now turn.

III.

As the majority of this panel points out, the BSO asserts a "First Amendment right to maintain artistic control of its own stage— [a] right to determine the artistic statements it wants or does not want to make, and the standards of performance and quality it wishes to pursue." *Supra* p. 39 (quoting BSO supplemental brief at 13). The majority goes on to state that "If the state or local government were attempting to dictate to the BSO how *Oedipus Rex* should be performed, there might well be a first amendment violation. But that is not the case before us." *Id.* Instead, it suggests that the BSO "is really claiming first amendment protection for . . . the right to perform without interruption by the audience." *Id.*

Here is the rub, where I part company. The majority's formulation of the right in question sets its analysis on the wrong course. The BSO does not claim a "right" against the audience that would require it to be silent; nor does it claim a right against the state to require that the audience be kept silent. The BSO's claim is, rather, that the state *is* "attempting to dictate how *Oedipus Rex* should be performed." It is that, in a dispute between private parties, the state is putting not only a thumb, but a fist, on the scales.

The BSO asserts, in short, a constitutional right against the Commonwealth of Massachusetts. In the context of this case, it faces the potential imposition of damages by virtue of a state statute, the MCRA. Its asserted First Amendment right is the freedom to exercise its artistic discretion in deciding how and whether to perform *Oedipus Rex*, without the imposition of a penalty by the Commonwealth. This right includes, at a minimum, the BSO's right not to speak, or to change the message it wishes to convey, in response to circumstances that it believes would alter or dilute its intended artistic expression. The majority concludes that recognizing an artistic integrity defense in this case "would mean that a performing artist, or group of artists, could deny another artist her statutorily protected right to perform because of the fear that the audience might interrupt the performance." This has facial appeal only until we rephrase the result of *not* recognizing the defense: "a performing artist can

invoke the power of the state to force another artist or group of artists to carry through a performance against its artistic judgment."

It cannot be doubted that the BSO's performance of *Oedipus Rex* would be a form of artistic expression fully protected as "speech" under the First Amendment. *Schad* v. *Borough of Mount Ephraim*, 452 U.S. 61, 65-66 (1981). It is well established that the state may not punish a private person for refusing to articulate a viewpoint that the person does not agree with. *See, e.g., Pacific Gas & Elec.* v. *Public Utilities Corporation of California*, 106 S.Ct. 903, 908-10 (plurality opinion); *Wooley* v. *Maynard*, 430 U.S. 705, 714-15 (1976). This is because a person's freedom to choose what he or she will or will not say is a protected right under the First Amendment. *See id.* at 714.

The Supreme Court has held that state statutes that force "speakers to alter their speech to conform with an agenda they do not set" are unconstitutional. *See Pacific Gas & Elec.*, 106 S.Ct. at 908-10, 914 (plurality opinion), 914 (Burger, C.J., concurring) (order of public utilities commission requiring utility to enclose, with electricity bills, publication asserting opinion on rates contrary to that of the utility violated utility's First Amendment right to choose what not to say) (plurality opinion); *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974) (Florida statute requiring newspaper to print political candidates' replies to editorials impermissibly intruded upon newspaper's First Amendment right to "editorial control and judgment"). *Cf. PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980) (where shopping center owner did *not* claim that his right of expression was infringed by others speaking on his property, state could require that the owner allow others to hand out pamphlets in area of shopping center open to public). *See also Pacific Gas & Elec.*, 106 S.Ct. at 909-10 (plurality opinion) (explaining PruneYard).

In *Wooley*, the Court declared that "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts." 430 U.S. at 714. More recently, the Court has explained:

> The essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. There is necessarily a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as the freedom of speech in its affirmative aspect.

Pacific Gas & Elec., 106 S.Ct. at 909 (plurality opinion) (emphasis in original, citations and quotations omitted). The corollary of these principles, applicable to the case at bar, is that a system which secures the right of free artistic expression must also guarantee the concomitant right of performing artists to exercise artistic choice in deciding not to perform. Otherwise, we would live in a society where artists' creative energies would be chilled because their artistic choices would be subject to state scrutiny and coercion.[2] *Cf. Tornillo*, 418 U.S. at 257 (a "government-enforced right of access inescapably dampens the vigor and limits the variety of public debate" expressed in the newspaper media) (citations and quotations omitted). Thus, assuming the BSO chose not to proceed with its performances of *Oedipus Rex* and its related contract with Redgrave, as the narrator of those performances, for reasons having to do with the artistic integrity of the production, that was an exercise of artistic expression, which is afforded protection from state interference under the First Amendment. If Redgrave's presence in any way threatened the BSO's freedom of artistic expression, then the BSO had the right to replace her or to can-

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2 The majority suggests that history teaches us to ignore the asserted right because Stravinsky's *Rites of Spring* might never have been performed if the artists, in the face of riots, had decided to cancel that performance out of fear that the artistic integrity of the production would be disturbed. *See supra* pp. 40-42. This is an erroneous analogy for two reasons. First, because it suggests that the performers' rights should be weighed against those of the audience and second, because it ignores the fact that artists' creativity would be chilled (whether in the case of the BSO's modern performance of *Oedipus Rex* or in the case of the original performances of Stravinsky's *Rites of Spring* if the state could impose penalties upon artists in their exercise of artistic discretion. Indeed, even performances such as the original presentations of *Rites of Spring* that (according to the testimony of Peter Sellars) generate their own art-enhancing riots might never occur if the state were allowed to intrude upon performing artists in their exercise of artistic freedom.

cel the performances free from state interference.[3] It would be sufficient that the BSO was unwilling, for artistic reasons, to take the chance of interruption.

The only question remaining, then, is whether the BSO established this artistic motivation as a matter of fact. The majority states that the district court found "that the BSO cancelled the performances out of ccncern that the potential disruptions could jeopardize . . . the artistic integrity of the production." *Supra* p. 33. With this fact established, I would conclude that the BSO exercised its First Amendment freedom of artistic expression in deciding not to go forward with its performances of *Oedipus Rex,* and in deference to the Supreme Judicial Court's "offered" construction of the MCRA, I would hold that the BSO cannot be held liable to Redgrave under that statute.[4]

The full extent of what I consider to be the majority's misconstruction of the First Amendment rights at issue in this case is revealed in its statement that "[a] police protected performance of Oedipus Rex with Redgrave as reader might not have resulted in an optimum performance by the BSO, but that is not the pivotal consideration here. Rather, the issue is whether an

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3 The BSO does not escape completely from liability, however, because, as we explained in part I, Redgrave can collect damages for its breach of contract.

4 Although we might, in some instances, dampen a First Amendment right in order to accommodate a substantial state interest that is furthered by a statute when that statute incidentally intrudes upon free speech, *see, e.g., United States* v. *O'Brien,* 391 U.S. 367, 376-77 (1968), we are not in a position to so water down the BSO's freedom of artistic expression in this case. The nature and extent of the Commonwealth's interest furthered by the MCRA is a question of state law, and in the context of the case at bar, the Supreme Judicial Court has communicated that if we recognize the BSO's asserted right, the legislature would not have intended that it be held liable under the MCRA in the exercise of that right. *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. at 97, 502 N.E.2d 1375, 1377. Thus, the Supreme Judicial Court has already suggested that the state interest reflected in the MCRA would not outweigh the BSO's constitutional right. This might not be so if the BSO cancelled the performances of *Oedipus Rex* because it wished to punish Redgrave or intrude upon her right to express political views. *See id.* But as pointed out above, those motivations on the part of the BSO are absent from this case.

artistic performance may properly be held hostage by the passions and prejudices of the community." *Supra* at 42. I detect in that statement the nightmarish suggestion that the state, or even the court can require artists to present less than optimal art to the general public in situations where the *artists* (*not* the audience) desire that their art not be presented. Recognition of the BSO's First Amendment right of "artistic integrity" does not, as the majority suggests, "allow[ ] the audience to dictate who shall perform and what shall be played." It allows the *artists* to decide. Rejection of the defense, on the other hand, permits the state to determine what and how artists shall perform. Such a turn of events would, in my opinion, not be a very happy one for the First Amendment.

VANESSA REDGRAVE & another[1]

—vs.—

BOSTON SYMPHONY ORCHESTRA, INC.

Suffolk. May 7, 1986.—January 21, 1987.

Present:

Hennessey, C.J., Wilkins, Liacos, Abrams, Nolan, Lynch, & O'Connor, JJ.

Civil Rights, Availability of remedy, Coercion by third party. *Statute*, Construction.

Questions of law certified to the Supreme Judicial Court by the United States Court of Appeals for the First Circuit.

Daniel J. Kornstein of New York for the plaintiffs.

Robert E. Sullivan (*John T. Harding, Jr., & Cheryl W. Heilman* with him) for the defendant.

Diana T. Tanaka, Assistant Attorney General, for the Attorney General, amicus curiae, submitted a brief.

Marc D. Stern, Lois Waldman & Ronald A. Krauss of New York, *Marvin N. Geller & Thomas M. Sobol*, for American Jewish Congress, amicus curiae, submitted a brief.

Marjorie Heins, F. Anthony Mooney & Robert P. Sherman, for Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association & another, amici curiae, submitted a brief.

HENNESSEY, C.J. The United States Court of Appeals for the First Circuit has certified two questions to this court. See S.J.C. Rule 1:03, as amended, 382 Mass. 700 (1981). The ques-

1 Vanessa Redgrave Enterprises, Ltd.

tions concern plaintiff Vanessa Redgrave's appeal from the denial of her motion for judgment notwithstanding the verdict by a judge of the United States District Court for the District of Massachusetts following a jury verdict favorable to the defendant Boston Symphony Orchestra, Inc. (BSO), on Redgrave's claims under the Massachusetts Civil Rights Act, G. L. c. 12, §§ 11H and 11I (1984 ed.).[2] In reporting these questions, the Court of Appeals stated that a central issue in the plaintiff's appeal turns on a significant question of Massachusetts law on which no controlling precedent in the decisions of this court exists. Redgrave argued at trial and argues on appeal that the BSO should be held liable under the Massachusetts Civil Rights Act because, in cancelling its performances of Stravinsky's "Oedipus Rex," in which Redgrave was to appear as narrator, the BSO acquiesced in expressions of disapproval of her political views voiced by BSO subscribers and other members of the community. Further, she contends that other motives offered by the BSO as justification for its decision to cancel the performances should not operate as defenses under the Massachusetts Civil Rights Act.

We summarize the facts relevant to the questions certified. See S.J.C. Rule 1:03, § 3 (2). In March, 1982, the BSO engaged the plaintiff, a professional actress, to appear as narrator in a series of performances of Stravinsky's "Oedipus Rex" in Boston and New York. Following announcement of the engagement, the BSO received calls from some of its subscribers and from community members protesting the engagement because of Redgrave's political support for the Palestine Liberation Organization and because of her views regarding the State of Israel. On or about April 1, 1982, the BSO cancelled its contract with Redgrave. This action was the subject of substantial attention and comment in the news media.

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2 Vanessa Redgrave and Vanessa Redgrave Enterprises, Ltd., sued the Boston Symphony Orchestra, Inc., for breach of contract and violation of the Massachusetts Civil Rights Act. The contract claim was made on behalf of both parties, but the claim under the State civil rights act was asserted only by Redgrave. See *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1191 (D. Mass. 1985).

Redgrave and Vanessa Redgrave Enterprises, Ltd., sued the BSO for breach of contract. Redgrave also alleged violations of the Massachusetts Civil Rights Act. The plaintiffs also made several claims that were held before trial to lack merit as a matter of law. *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 602 F. Supp. 1189, 1191 (D. Mass. 1985). See *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 557 F. Supp. 230 (D. Mass. 1983). After a sixteen day trial, the jury answered special interrogatories favorably to the plaintiffs on the breach of contract claim and favorably to the BSO on the civil rights claim. The parties filed cross-motions for judgment notwithstanding the verdict. 602 F. Supp. at 1191. The Federal District Court judge denied Redgrave's motion and entered judgment for Redgrave on the breach of contract claim but held that, as a matter of law, damages were to be limited to the performance fee. *Id.*

In the order of certification, the Court of Appeals states that "BSO agents testified that the performances were cancelled because it was felt that potential disruptions, which BSO agents perceived as quite possible given the community reaction, would implicate the physical safety of the audience and players and would jeopardize the artistic integrity of the production. The district court found this testimony to be credible and worthy of substantial weight. Additionally, in response to special interrogatories, the jury found that BSO and its agents did not cancel the performances because of their own disagreement with Redgrave's political views. *Redgrave* v. *BSO*, 602 F. Supp. 1189, 1192 (D. Mass. 1985)."

The Court of Appeals further states, "Redgrave contends that even if BSO agents did not themselves disagree with her political views and did not cancel the contract because they wished to punish her for past speech or repress her future speech, BSO cancelled the contract in response to pressure from third parties who did disagree with and wished to repress Redgrave's speech. Redgrave . . . argue[s] that BSO's acquiescence to pressure from third parties made it liable under the Massachusetts Civil Rights Act, Mass. Gen. Laws Ann. c. 12, § 11H-I . . . . The district court concluded that '[a]lthough cancellation because of acquiescence when confronted with the public pressure of a vocal minority may be a breach of contract, it is

not a violation of the Massachusetts Civil Rights Act.' 602 F. Supp. at 1192. According to the court, '[n]either the cancellation nor the acquiescence unaccompanied by [express personal disagreement with Redgrave's views] amounts to "threats, intimidation, or coercion" which must be proved to establish a claim under the statute.' "

Because the existence of Redgrave's claim under the Massachusetts Civil Rights Act depends on the proper interpretation of the act, the Court of Appeals certified the following two questions to this court: "1. Under the Massachusetts Civil Rights Act, Mass. Gen. Laws Ann. ch. 12, § 11H and § 11I, may a defendant be held liable for interfering with the rights of another person, by 'threats, intimidation, or coercion', if the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights? 2. If a defendant can be held liable under the Massachusetts Civil Rights Act for acquiescence to third party pressure, is it a defense for the defendant to show that its actions were independently motivated by additional concerns, such as the threat of extensive economic loss, physical safety, or particular concerns affecting the defendant's course of business?"[3]

1. *The Meaning of the Two Certified Questions.*

We answer the two certified questions in accordance with their clear and unequivocal wording. In doing so, we express no opinion on some serious issues which are not addressed in the questions but which are suggested by the record of the case.

It can be inferred from the record that the BSO was itself a victim of violations of G. L. c. 12, § 11H, by those persons who put pressure on the BSO to cancel the Redgrave participation. From the premise that the BSO had the free speech right to perform or not as it saw fit, it can be argued that the BSO's secured rights were interfered with, and that it was not within the legis-

3 We acknowledge the briefs amici curiae filed by the Attorney General of the Commonwealth, the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association and the Civil Liberties Union of Massachusetts, and the American Jewish Congress.

lative intent that anyone should be punished under c. 12 for exercising the constitutional right not to speak (i.e., perform). It can also be argued that when a private person decides not to speak and has no duty to do so, it would be unconstitutional to require that person to speak or, contractual obligations aside, to punish him civilly for not speaking.

The foregoing arguments can be focused on both of the certified questions. It can be offered that a person exercising constitutional rights who interferes with another's constitutional rights is not (Question 1) "interfering with the rights of another person by 'threats, intimidation, or coercion,' " within the meaning of G. L. c. 12, §§ 11H and 11I. It can be further offered by way of defense to an action under §§ 11H and 11I. (Question 2) that the defendant was motivated by the "additional concern[ ]" of the artistic integrity of its production; that this motivation is within the defendant's free speech rights; and that this independent motivation, if established, is a complete defense to the action where it is also shown that the defendant had no personal wish either to punish the plaintiff or to intrude upon the plaintiff's rights.

We have not considered any of the above arguments or issues in answering the two certified questions. We treat the questions as addressed to a typical action under the Massachusetts Civil Rights Act, which does not concern a defendant who is exercising a free speech or other constitutional right in interfering with the secured rights of another. In short, we answer the two questions as they are worded.

2. *Acquiescence to Third Party Pressure as a Basis for Recovery Pursuant to G. L. c. 12, §§ 11H and 11I.*

The Massachusetts Civil Rights Act provides a State remedy for interference or attempts to interfere with the exercise or enjoyment of rights secured by the Constitution or laws of the United States or rights secured by the Constitution or laws of the Commonwealth by threats, intimidation, or coercion. G. L.

c. 12, § 11H.[4] Section 11-I[5] authorizes a private cause of action for the deprivation of secured rights and an award of attorneys' fees for the prevailing party. See *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 820 n.2 (1985) (*Batchelder II*). The remedy provided in §§ 11H and 11I is coextensive with the remedy provided under Federal law by means of 42 U.S.C. § 1983 (1982), except that the State statute does not condition the availability of the remedy on State action. G. L. c. 12, § 11H. *Bell* v. *Mazza* 394 Mass. 176, 181 (1985).

Our function in interpreting any statute is to ascertain "the intent of the Legislature, as evidenced by the language used, and considering the purposes and remedies intended to be advanced." *Glasser* v. *Director of the Div. of Employment Sec.*, 393 Mass. 574, 577 (1984). *Commonwealth* v. *Galvin*, 388 Mass. 326, 328 (1983). *Commonwealth* v. *Graham*, 388 Mass. 115, 119 (1983). Like all civil rights statutes, §§ 11H and 11I are entitled to liberal construction. *Batchelder II*, *supra* at 822. 3A C. Sands, Sutherland Statutory Construction § 74.05, at 650

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4 Section 11H provides: "Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business."

5 Section 11I provides: "Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court."

(4th ed. 1986). Accordingly, cases within the reason, although not within the letter, of a remedial statute are embraced by its provisions. *Batchelder II, supra.* 2A C. Sands, Sutherland Statutory Construction § 54.04, at 570 (4th ed. 1984).

To determine whether actions taken in the face of pressure from third parties violate §§ 11H and 11I, we first examine the statutory language. The statute imposes no express or implied requirement that an actor specifically intend to deprive a person of a secured right in order to be liable under the statute. Nor does the language of the statute admit of any express or implied exemption for conduct undertaken in response to third-party pressure. As we have said, the remedy provided in §§ 11H and 11I was intended to be coextensive with the remedy in 42 U.S.C. § 1983, except for the State action requirement. *Batchelder II, supra* at 822-823. *Bell* v. *Mazza, supra* at 181-182. In interpreting § 1983, the United States Supreme Court has held that specific intent is not a prerequisite to a violation of § 1983. In the case of *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Supreme Court held that the absence of the term "wilfully" in § 1983 indicated that § 1983 requires only the degree of intent "that makes a [person] responsible for the natural consequences of his actions." *Id.* at 187. More recently, the Supreme Court has reiterated its conclusion in the *Monroe* v. *Pape* case in holding that § 1983 creates a civil remedy and "contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right." *Daniels* v. *Williams*, 106 S. Ct. 662, 664 (1986). *Parratt* v. *Taylor*, 451 U.S. 527, 534-535 (1981).

Similarly, c. 12, §§ 11H and 11I, contain no state of mind prerequisite for recovery. Like § 1983, c. 12, §§ 11H and 11I, do not require that the defendant's action be [sic] wilful. General Laws c. 265, § 37, on the other hand, which provides for criminal penalties in cases of civil rights violations, and was enacted at the same time as the "civil" counterpart in §§ 11H and 11I, requires that the defendant's action be wilful.[6] In *Bat-*

6 In pertinent part, G. L. c. 265, § 37 (1984 ed.), reads as follows: "No person, whether or not acting under color of law, shall by force or threat of force, *willfully* injure, intimidate or interfere with . . . any other person in the free exercise or enjoyment of any right . . ." (emphasis added).

chelder II, *supra*, a security guard was merely enforcing a general rule of the defendant shopping center against distribution of materials and solicitation. It was not shown that there was any specific opposition to the message Batchelder was attempting to spread. We think our reasoning in that case supports a conclusion that the statute's coercion requirement was satisfied simply because the natural effect of the defendant's action was to coerce Batchelder in the exercise of his rights. *Id.* at 823.

Making an exemption for civil rights deprivations resulting from third-party pressure "would reward and encourage" the very conduct which the substantive statutes prohibit. See *Sarni Original Dry Cleaners, Inc.* v. *Cooke*, 388 Mass. 611, 618 n.7 (1983). Whether the issue is phrased in terms of the existence of a specific intent requirement under the Massachusetts Civil Rights Act or a third-party pressure exemption from the statute, recognizing such an exemption would tend to eviscerate the statute and defeat the legislative policies behind the statute. Persons seeking to interfere with the civil rights of others in violation of the statute may not know or believe that the interference may lead to civil or criminal liability. Thus, to be effective, the provisions of §§ 11H and 11I must apply to any threatening, intimidating, or coercive behavior regardless of whether the defendant specifically intended to interfere with a right to which the plaintiff is entitled. Accordingly, we answer "yes" to the first question.

3. *Availability of Defenses Under the Massachusetts Civil Rights Act When Liability is Based on Acquiescence to Third-Party Pressure.*

The second question certified to us asks us to consider whether it is a defense to liability for acquiescence to third-party pressure "for the defendant to show that its actions were independently motivated by additional concerns, such as the threat of extensive economic loss, physical safety, or particular concerns affecting the defendant's course of business."

As an abstract proposition, fear of business disruption, fear for economic loss, or fear for physical safety are not justifications under §§ 11H and 11I. The legislative intent would be

negated if such defenses were permitted. See *Sarni Original Dry Cleaners, Inc.* v. *Cooke*, *supra*. In an analogous context, the Supreme Court has rejected the notion that private biases and injuries that may be inflicted as a result of such biases are permissible justifications for deprivations of constitutional rights. *Palmore* v. *Sidoti*, 466 U.S. 429 (1984). Fear that the prejudice of third-party actors may lead to a breach of the peace has also been rejected as a justification for deprivations of civil rights. *Buchanan* v. *Warley*, 245 U.S. 60, 81 (1917). We recognize that explicit and imminent danger of physical harm might well in some circumstances justify interference with an individual's civil rights (cf. *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 [1969]), but the certified question raises no such premise. Our answer to the second certified question is, "No."

4. *Conclusion.*

We answer, "Yes" to the first certified question, and "No" to the second certified question.

WILKINS, J. (concurring, with whom Abrams, J., joins). I concur in the answers given to the questions as the Chief Justice's opinion has construed them. I do not, however, as he does, regard the questions as clear and unequivocal. Indeed, his discussion of the meaning of the questions in the first numbered part of his opinion indicates that substantial constitutional questions may be explicitly, and surely are impliedly, involved in the questions. Perhaps the Court of Appeals intended to insulate us from consideration of constitutional issues. Certainly from the briefs filed with us it is clear that constitutional considerations, particularly the BSO's rights of free speech, are thought to be seriously involved. Because the BSO's constitutional right to free speech under art. 16 of the Massachusetts Declaration of Rights is present in this case, it may seem surprising to some that no question has been asked of us concerning the BSO's State constitutional right to determine not to perform "Oedipus Rex." Perhaps the Court of Appeals has already concluded that, if the nonconstitutional grounds indi-

cated by its questions are not dispositive of Redgrave's claim, First Amendment considerations will be and that, therefore, it need not ask us about analogous State constitutional considerations.

I have been unable to think of any theory under which, in the circumstances, statutory liability may properly be imposed on the BSO in the face of its State constitutional right to determine what artistic performances it will or will not perform. Redgrave's constitutional rights are no greater than those of the BSO, and there was no way in which the interests of each could be accommodated. Cf. *Batchelder* v. *Allied Stores Int'l, Inc.*, 388 Mass. 83, 92-93 (1983) (defendant's property interest could be accommodated with the plaintiff's constitutional right to gather signatures on nomination papers).

O'CONNOR, J. (dissenting, with whom Lynch, J., joins). I do not agree that G. L. c. 12, § 11I, imposes liability on a defendant whose intentional conduct unintentionally causes interference with a plaintiff's secured right. The language of the statute and its purpose as evidenced by legislative history demonstrate that a plaintiff's right of recovery is contingent on a showing of the defendant's specific intent.

To understand c. 12, § 11I, one must appreciate the distinction between intent and motive—a distinction our law, particularly our criminal law, frequently makes. A man motivated by hostility may strike another man, intending to inflict pain. A second man, harboring no ill will toward the victim but only motivated by a desire to please third persons, may also strike another man, intending to inflict pain. Both actors have the specific intent to inflict pain although their motives are different. The relevancy of the distinction between intent and motive will become apparent later in this opinion.

Also, to understand c. 12, § 11I, one must be aware that an act may have many natural, even inevitable, effects, and that the actor may intend only some of those effects without intending the others no matter how clearly he foresees them. The surgeon, for example, treats his patient with the specific intent to

improve the patient's health. The surgeon knows that the treatment unavoidably will cause pain; yet he does not intend the pain since it is not the pain that produces the desired result. Of course, as an evidentiary matter, a fact finder is warranted in finding that a defendant specifically intended the natural consequences of his voluntary act, but that inference is not required and frequently, as illustrated by the example of the surgeon, is inappropriate.

Another illustration of an act having multiple effects comes to mind. It may be that the BSO's cancellation of the performances of "Oedipus Rex" had several effects that were both natural and specifically intended, such as the removal of the risk of injury to performers and to the audience and the prevention of disruption that could destroy an artistic performance. Another natural effect of the BSO's act might have been the chilling of Redgrave's right on a future occasion to express her political views, but that effect may not have been intended by the BSO since the assurance of safety and the prevention of disruption at the time of the intended performance would not be advanced by the chilling of Redgrave's rights of political speech in the future. It may be that the BSO intended only to exercise its constitutional right not to present an inartistic performance and not to subject its performers and audience to danger, and that it had no interest in silencing Redgrave's future political expressions.

General Laws c. 12, § 11I, provides injunctive and monetary relief for interference or attempted interference with secured rights "by threats, intimidation or coercion." As the Chief Justice's opinion observes *ante* at ____, civil rights statutes should be liberally construed to accomplish their remedial purpose, *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 822 (1985) (*Batchelder II*); 3A C. Sands, Sutherland Statutory Construction § 74.05, at 650 (4th ed. 1986), but as the Chief Justice's opinion also notes, *ante* at ____, quoting *Glasser* v. *Director of the Div. of Employment Sec.*, 393 Mass. 574, 577 (1984), the court's primary function in interpreting any statute is to ascertain "the intent of the Legislature, as evidenced by the language used, and considering the purposes and remedies intended to be advanced." Having stated those relevant principles, the Chief

Justice's opinion omits any discussion of the usual meaning given to the words, "threats, intimidation, or coercion," and it fails to consult legislative history as a source of information concerning the objective the statute was designed to achieve. A proper response to the certified questions is impossible without consideration of these matters.

A threat is commonly understood to be a wilful expression of intention to inflict injury or damage on another. Intimidation ordinarily means putting in fear for the specific purpose of compelling or deterring another's conduct. Coercion is the intentional restraint or domination of another's will. Presumably, the statutory word "coercion" in the term "threats, intimidation or coercion," refers to a type of restraint other than the restraint accomplished by means of fear. "Coercion" appears to refer to restraint accomplished by physical force. Certainly, the three words together connote the deliberate use of force, moral or physical, to control another's conduct. Therefore, in order to recover damages under G. L. c. 12, § 11I, construed according to the ordinary usage of its language, a plaintiff must prove the defendant's specific intent to interfere with the plaintiff's secured rights.

That the Legislature intended specific intent to interfere with secured rights as an essential element of a cause of action under G. L. c. 12, § 11I, is made abundantly clear by the Governor's legislative file on House Bill No. 3135, Chapter 801 of the Acts of 1979, in the State Archives. Before enactment, §§ 11H and 11I were part of that House Bill. *Batchelder II*, *supra* at 821. The file contains the "history of . . . [the] enactment process and various statements concerning the nature and effect of the proposed law. As such, the file is 'an instructive source, indicative of what meaning the legislature intended.' 2A C. Sands, Sutherland Statutory Construction § 48.04, at 300 (4th ed. 1984)." *Batchelder II*, *supra* at 821 n.3.

In *Batchelder II*, *supra* at 821, we said: "The Legislature passed this statute to respond to a need for civil rights protection under State law. Deprivations of secured rights by private individuals using violence or threats of violence were prevalent at the time that the Legislature considered G. L. c. 12, §§ 11H and 11I. See Boston City Council Resolution of November 14,

1979, endorsing House Bill No. 3135 noting 'serious problems of racial harassment.' Aggrieved parties often could not succeed under 42 U.S.C. § 1983 (Supp. V 1981), because the Federal statute requires 'State action.' See *Williams* v. *Hot Shoppes, Inc.*, 293 F.2d 835, 836, 837 (D.C. Cir. 1961), cert. denied, 370 U.S. 925 (1962). Criminal prosecutions under State law were also unsatisfactory; convictions were difficult and the victim was not compensated for the harm." Other documents in the Governor's legislative file, far too numerous to identify, much less quote, demonstrate beyond reasonable question that c. 12, § 11I, was enacted in response to a concern about the inadequacy of then current law to deal generally with discrimination against minority groups, and more specifically, to deal with racial violence. Racial discrimination and violence involve conduct that is specifically designed to interfere with secured rights, and it is that kind of conduct that the Legislature made the basis of civil liability.

We said as much in *Bell* v. *Mazza*, 394 Mass. 176 (1985). In that case, we held that a complaint under G. L. c. 12, § 11I, was sufficient to withstand a motion to dismiss. We pointed out that the complaint alleged that one of the defendants "threatened to do anything at any cost to prevent the plaintiffs' construction of [a] tennis court. The plaintiffs alleged that shortly after this threat they received a letter which stated all the defendants had joined in an association to prevent the plaintiffs from constructing the tennis court." *Id.* at 183-184. "From these allegations," we said, "it could be inferred that the defendants engaged in a joint venture *with the goal* of interfering with the plaintiffs' property rights . . . . The plaintiffs sufficiently alleged threats, intimidation, or coercion in their complaint." (Emphasis added.) *Id.* at 184. Hence in *Bell* v. *Mazza*, *supra*, the court focused on the defendants' specific intent to prevent the plaintiffs' exercise of their constitutional rights as support for the court's conclusion that the plaintiffs had stated a claim under c. 12, § 11I. As the court put it, "[t]he interpretation of G. L. c. 12, § 11I, that we adopt today does not result in creating a vast constitutional tort. The Legislature explicitly limited

this remedy to situations where the derogation of secured rights occurs by 'threats, intimidation or coercion.' " *Id.* at 182.

The language of G. L. c. 12, § 11I, its legislative history, precedent, and the undesirability of expanding a reasonable statute into one that would create a vast and uncontrollable constitutional tort forcefully demonstrate that the statute is properly interpreted to provide for liability only when the defendant interferes with a plaintiff's secured rights with the specific intent to do so. That specific intent is required is also supported by another consideration. The Chief Justice's opinion recognizes, *ante* at p. 6, that its answers to the certified questions may implicate serious constitutional questions stemming from the BSO's constitutional right not to speak (i.e., perform), and not to be civilly liable for not speaking. Those constitutional questions are reduced or altogether removed by construing § 11I as imposing liability only on a defendant who specifically intends to interfere with another's secured rights. "It is our duty to construe statutes so as to avoid . . . constitutional difficulties, if reasonable principles of interpretation permit." *Langone* v. *Secretary of the Commonwealth*, 388 Mass. 185, 190 (1983), appeal dismissed, 460 U.S. 1057, quoting *School Comm. of Greenfield* v. *Greenfield Educ. Ass'n*, 385 Mass. 70, 79 (1982).

The Chief Justice's opinion's conclusion that c. 12, § 11I, does not require specific intent effectively converts the statute into one that provides for liability whenever there is a causal connection between the defendant's intentional act (without reference to the actor's goal) and an interference with a secured right of the plaintiff, thus depriving the words "threats, intimidation or coercion" of any meaning. This is contrary to accepted principles of statutory construction. In arriving at that conclusion, the Chief Justice's opinion notes that specific intent is not a prerequisite to a violation of 42 U.S.C. § 1983 and relies on our statement in *Batchelder II*, *supra* at 822-823, that "the Legislature intended to provide a remedy under G. L. c. 12, § 11I, coextensive with 42 U.S.C. § 1983 (Supp. V 1981), except that the Federal statute requires State action whereas its State counterpart does not." *Ante* at p. 7. The question in *Batchelder II* was whether the plaintiff had "prevailed" within the mean-

ing of G. L. c. 12, § 11I, in an earlier case in this court, *Batchelder* v. *Allied Stores Int'l, Inc.*, 388 Mass. 83 (1983) (*Batchelder I*), a case in which the defendant's specific intent was clear. The court noted that § 11I "is similar to 42 U.S.C. § 1988 to the extent that both statutes use the term 'prevail' to determine a party's right to attorneys' fees," *Batchelder II*, *supra* at 821, and the court concluded that, just as the plaintiff would have been entitled to attorneys' fees under the Federal statute in the circumstances of *Batchelder I*, if the Federal statute applied to private action, so too he was entitled to attorneys' fees under § 11I. It was in that context that the court said that the *remedy* under the Federal and State statutes is coextensive. The court understandably did not say that because 42 U.S.C. § 1983 has no specific intent requirement, neither does c. 12, § 11I, have such a requirement. Not only is 42 U.S.C. § 1983 concerned only with State action, but also § 1983 does not contain the language "threats, intimidation or coercion" or words of similar import. The statutes can be given the same meaning only by ignoring critical differences in their language and their purposes.

The Chief Justice's opinion finds support for its conclusion that §§ 11H and 11I contain no state of mind prerequisite for recovery by contrasting those sections with G. L. c. 265, § 37 (1984 ed.), which imposes criminal penalties for civil rights violations and was enacted at the same time §§ 11H and 11I were enacted. St. 1979, c. 801, §§ 1, 2. General Laws c. 265, § 37, provides that "[n]o person . . . shall by force or threat of force, willfully injure, intimidate or interfere with . . . any other person in the free exercise or enjoyment of any right . . . ." Threats, intimidation, and coercion, as commonly understood, are wilful. The fact that the Legislature refrained from using redundant language in §§ 11H and 11I although such redundancy appears in the criminal statute ("willfully" and words of similar import are frequently used in criminal statutes), should not lead the court to construe §§ 11H and 11I in a way that distorts the ordinary meaning of the statutory language, disregards the legislative history indicating the legislative concern prompting enactment of those sections, disregards

precedent, and leads to the creation of a vast new constitutional tort.

In his brief as amicus curiae, the Attorney General argues for the statutory construction adopted by the court. His position appears to result from his failure to make the very important distinction between specific intent and motive. He tells us of the numerous injunctions he has obtained prohibiting defendants individually and in groups from engaging in threats, intimidation, or coercion that would deprive others of rights secured by State or Federal law. The Attorney General describes those cases as follows: "All of the cases brought by Attorney General Bellotti under G. L. c. 12, § 11H have involved severe deprivations of basic rights, by means including physical assault, property vandalism, and threats to safety. Several of the cases have involved defendants engaged in group conduct." The Attorney General argues that "[s]eparating out individual *motivation* would be virtually impossible in such group cases. In these circumstances, especially where defendants are youthful and part of a 'gang', peer pressure is as powerful a force as individual invidious intent. G. L. c. 12, § 11H is an invaluable law enforcement tool for the preservation of civil rights in the Commonwealth. It would be eviscerated were the Attorney General required to prove such personal *motivation* in each case" (emphasis added). The Chief Justice's opinion exhibits both a concern and a misunderstanding similar to those of the Attorney General, when it says that "[w]hether the issue is phrased in terms of the existence of a specific intent requirement under the Massachusetts Civil Rights Act or a third-party pressure exemption from the statute, recognizing such an exemption would tend to eviscerate the statute and defeat the legislative policies behind the statute." *Ante* at p. 10.

The concerns of the Attorney General and the plurality are met by §§ 11H and 11I even though those sections are construed to require specific intent. Surely, the Attorney General as well as a private individual should be entitled to relief without having to prove that the defendant's purposeful conduct was motivated by his hatred or intolerance, rather than his acquiescence to third-party pressure, but it is not necessary to read the requirement of specific intent out of the statute in order to

accomplish that result. If a defendant is shown to have used threats, intimidation, or coercion for the purpose of interfering with secured rights, whether he knows they are secured or not, relief is appropriate without a further showing of why the defendant formed that purpose. Nothing in the statute requires proof of motive in addition to specific intent.

The first certified question asks whether, under c. 12, §§ 11H and 11I, a defendant may "be held liable for interfering with the rights of another person, 'by threats, intimidation, or coercion,' if the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties who did wish to interfere with such rights." This question reasonably may be understood as *assuming* that the statute requires proof of a specific intent to interfere with secured rights as a prerequisite to recovery (in accordance with the plain meaning of the words "threats, intimidation or coercion"), and as inquiring whether such intentional interference may be the basis of liability although it is motivated by third-party pressure rather than by the defendant's personal animosity toward the plaintiff or the plaintiff's exercise of secured rights. The second question then inquires whether, if intentional interference with secured rights may be the basis of liability although it was motivated by third-party pressure, the defendant may nevertheless be exempt from liability by showing that "its actions were independently motivated by additional concerns, such as the threat of extensive economic loss, physical safety, or particular concerns affecting the defendant's course of business." I believe that the certified questions focus on motive, not on intent. Interpreting the questions that way, I agree with the Chief Justice's opinion that the answer to the first question is "Yes," and the answer to the second question, is "No." On the other hand, if the first question is not construed as assuming that the statute imposes liability only on proof of the defendant's specific intent to interfere with the plaintiff's secured rights, I would answer that a defendant may be liable only if his specific intent be established, but if the defendant's specific intent is established, the defendant is not excused by having been motivated by third-party pressure. I would answer the second question by saying that the defendant's intentional interference with secured rights

would not be excused by the fact that the defendant was motivated not only by third-party pressure but also by additional concerns such as the threat of extensive economic loss, physical safety, or concerns affecting the defendant's course of business.

In my view, discussion of one further matter is appropriate, even though it is not required by the certified questions apart from the context in which they arose. Redgrave has not identified the secured right with which the defendant has allegedly interfered. Her brief appears to characterize the cancellation of "Oedipus Rex" as punishment for her earlier political statements. Punishment for the exercise of a right in the past is not, by itself, interference with the right. Interference requires that there be a limitation on the present or future exercise of the right. At best, cancellation of "Oedipus Rex" in response to third-party pressure may have conveyed a message to Redgrave that in the future other performances may be cancelled, but the conveyance of that message did not amount to threat or intimidation unless it suggested that the BSO itself intended to take future harmful action against her. Mere cancellation of the performances would not appear to convey the message that the BSO intended to take any future action. Furthermore, cancellation of the performance, at which no political speech was expected, did not constitute interference with secured rights by coercion. Thus, it is doubtful that in this case, interference with secured rights by threats, intimidation, or coercion was shown even if no specific intent was required.

Relevant Constitutional and Statutory Provisions

The First Amendment to the Constitution of the United States

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article XVI of the Constitution of Massachusetts

> The liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in the commonwealth. The right of free speech shall not be abridged.

Massachusetts General Laws, Chapter 12, Section 11H

> Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

Massachusetts General Laws, Chapter 12, Section 11I

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil

action for the injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civ. A. No. 82-3193-K

Feb. 13, 1985

Vanessa REDGRAVE and Vanessa Redgrave Enterprises, Ltd.,

Plaintiffs,

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Defendant.

Noted actress who had been engaged by symphony orchestra to narrate a work sued the orchestra for breach of contract and for rotation [sic] of Massachusetts Civil Rights Act, claiming that cancellation was in retaliation for actress' public expressions on political issues. The District Court, Keeton, J., held that: (1) any cancellation because of acquiescence in expressions of disapproval voiced by symphony subscribers and other members of the community was not actionable under the Act; (2) symphony breached the contract and was liable for performance fees less than expenses that would have been incurred to perform the contract; and (3) under analogy of law to defamation the actress was not entitled to compensation for asserted harm to her professional career absent showing that any statement expressed in the cancellation involved some unprivileged matter.

Judgment in part for plaintiffs and in part for defendants.

1. Civil Rights

Although cancellation because of acquiescence when confronted with public pressure of a vocal minority may be a

breach of contract, it is not a violation of Massachusetts Civil Rights Act. M.G.L.A. c. 12, §§ 11H, 11I.

2. Civil Rights

Noted actress had no claim against symphony orchestra under Massachusetts Civil Rights Act based on cancellation of performances, which actress was to narrate, because of alleged disagreement with actress' public expressions of support for Palestine Liberation Organization or due to acquiescence in expressions of disapproval voiced by symphony subscribers and other members of the community as there was no evidence of requisite threats, intimidation or coercion. M.G.L.A. c. 12, §§ 11H, 11I.

3. Constitutional Law

Protection of freedom is the prime objective of the legal system and freedom of speech, freedom of artistic expression, freedom of contract and freedom of choice on political and moral issues are among protected activities and implicit in the protection of freedom in those and other contexts is a conception of society in which pluralism may flourish. U.S.C.A. Const.Amend. 1.

4. Constitutional Law

The law does not forbid an entity organized to promote a form of art or those who function as its managerial agents from taking account of recognized differences among its members and patrons regarding controversial political issues and it is not illegal for a private entity to choose not to contract with an artist if its agents believe the artist's appearance under their sponsorship would be interpreted by others as in some degree a political statement. U.S.C.A. Const.Amend. 1.

5. Contracts

By contracting with a party an entity does not entirely surrender all of its freedom to act and the entity retains to a certain extent its interest in freedom of expression and freedom of

choice at least regarding conditions that in good faith it considers essential to artistic production or to protection against physical risks.

6. Damages

Measure of damages for breach of contract whereby noted actress was engaged by symphony orchestra to narrate a performance included the performance fees less expenses that would have been incurred to perform.

7. Civil Rights

Although individuals and entities are free in various contexts to make contractual choices for whatever reasons they find sufficient, the law does impose constraints against actions based on reasons that are classified as invidious, such as discrimination on basis of race or sex.

8. Damages

Under Massachusetts law, damages may be awarded for consequential harm if such harm was within the contemplation of the parties and was caused directly by the breach or indirectly by the combined effect of breach of contract and foreseeable intervening causes.

9. Damages

Under Massachusetts contract law, legal standard as to what is within the contemplation of the parties, for purpose of assessing damages on breach, includes consequences that were foreseeable to a person of reasonable prudence in the position of the party charged with the breach at the time the contract was made.

10. Damages

Actress' inability to precisely prove measure of harm to her reputation from symphony orchestra's cancellation of agreement whereby actress was to narrate a work did not defeat her claim.

11. Contracts

Influence of some statement made by symphony orchestra on later decisions of others, be it a statement of fact or opinion implied in orchestra's cancellation of agreement with noted actress to narrate a work, or express or implied in orchestra's press release announcing cancellation of the work was an inescapable element of claimed causal connection between cancellation and the consequential harm to actress' professional career.

12. Constitutional Law

First and Fourteenth Amendments protect only against governmental intrusions. U.S.C.A. Const.Amends. 14.

13. Constitutional Law

Legal constraints protecting freedom of expression are primarily designed as a shield, not a sword and may be invoked generally in defense of freedom and only rarely to sustain an action for damages. U.S.C.A. Const.Amend. 1.

14. Libel and Slander

A plaintiff who seeks award of damages for harm connected with the wrongful act of defendant through a communicative link must show at least that the communicative link involved some unprivileged statement and absent such a showing the causal connection between wrong and harm is broken because an essential link of the chain is itself legally protected expression and, thus, a plaintiff who seeks to use a communicative link as part of the chain of causation must disentangle actionable expression from protected expression in that link, which may be either statement of fact or a statement of opinion and may be expressed or implied and may be true or untrue.

15. Contracts

Under analogy law of defamation, well recognized actress who had openly expressed her views on political issues of worldwide interest and concern failed to show entitlement to conse-

quential damages for alleged harm to her career due to symphony orchestra's breach of contract with actress to narrate work as there was no showing that any message conveyed by cancellation was more than a statement of fact that was other than true, and even if some element of the message involved a false statement of fact or a statement of opinion not in fact held there was no showing that harm was caused by some impermissible element or elements of the message rather than legally privileged expressions of fact or opinion showing that orchestra acted with disregard for the truth or falsity of a material statement of fact impliedly communicated.

16. Constitutional Law

It is a dubious contention that damages may be awarded for harm caused by a false statement that the speaker holds an opinion that in fact the speaker does not hold. U.S.C.A. Const.Amend. 1.

Daniel J. Kornstein, Kornstein, Veisz & Wexler, New York City, for plaintiffs.

Keith Long, Robert E. Sullivan, Herrick & Smith, Boston, Mass., for defendant.

Opinion

KEETON, District Judge.

Plaintiffs, Vanessa Redgrave (Redgrave) and Vanessa Redgrave Enterprises, Ltd., sued the Boston Symphony Orchestra, Inc. (BSO) for breach of contract and violation of the Massachusetts Civil Rights Act, Mass.Gen.Laws Ann. ch. 12, § 11H & § 11I (1984). Plaintiffs also made several claims that were held before trial to lack merit as a matter of law. *See Redgrave v. Boston Symphony Orchestra, Inc.*, 557 F.Supp. 230 (D.Mass. 1983). All the asserted claims arose from BSO's cancellation of its performances of Oedipus Rex in Boston and

New York, in which Vanessa Redgrave was scheduled to appear as narrator. Plaintiffs contend that BSO cancelled the performances in retaliation for Redgrave's public expression on political issues. BSO argues primarily that the performances were cancelled because of a concern for physical security and a decision that risks of disruption would impair the artistic integrity of the performances. Because Vanessa Redgrave Enterprises, Ltd. was a party to the contract, the contract claim was made on behalf of both plaintiffs. The civil rights claim was asserted only by Redgrave.

The parties presented evidence on the contract and civil rights claims to a jury in a sixteen-day trial. The jury answered special interrogatories favorably to plaintiffs on the breach of contract and favorably to BSO on the civil rights claim. The parties have filed cross motions for judgment notwithstanding the jury's verdict.

The claims and defenses asserted during the trial present many issues of first impression. Some of these issues are moot in view of the jury's answers to the interrogatories. Others must be resolved to determine the judgment to be entered. First, I address the state civil rights claim and deny Redgrave's motion for judgment notwithstanding the verdict. Second, I examine the breach of contract claim and the measure of damages for breach. I conclude that judgment is to be entered for plaintiffs on the breach of contract claim but that, as a matter of law, damages must be limited to the performance fee.

[1192] I.

THE CLAIM UNDER THE MASSACHUSETTS CIVIL RIGHTS ACT

The Massachusetts Civil Rights Act provides for a private right of action against "any person or persons, whether or not acting under color of law, [who] interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or rights secured by the constitution or laws of

the commonwealth." Mass.Gen.Laws Ann. ch. 12, § 11H (1984); *id.* § 11I. At trial, Redgrave offered two theories to support her contention that BSO violated the civil rights act.

First, Redgrave contended that the BSO cancelled the performances because of its disagreement with her public expressions of support for the Palestine Liberation Organization (PLO) and with the intent to retaliate against her for those expressions and to cause her to become less outspoken in the future. The first and second interrogatories submitted to the jury bear upon this theory (as well as bearing upon the claim for consequential damages for breach of contract, discussed in Parts II and III of this opinion). These interrogatories asked whether BSO's primary or only reason for cancelling was that agents who acted for BSO in making the decision to cancel did so because of their disagreement with Redgrave's publicly expressed political views (interrogatory 1), whether one or more of the BSO's agents urged cancellation because of their personal disagreement with those views (interrogatory 2A), and whether BSO would not have cancelled but for their influence (interrogatory 2B). *See infra* Appendix 1. The jury returned a verdict with negative answers to interrogatories 1 and 2A. By agreeing to the submission of interrogatories 6 to 10 with instructions that they were not to be answered in the event of negative answers to interrogatory 1 and either interrogatory 2A or 2B, Redgrave acknowledged that the jury's negative answers to interrogatories 1 and 2A rejected an essential factual premise of Redgrave's first civil rights theory.

Second, Redgrave claimed that, even if BSO's decision to cancel was not made to express disapproval of her public expression of her political views, BSO should be held liable under the Massachusetts Civil Rights Act because BSO, in cancelling, acquiesced in expressions of disapproval voiced by BSO subscribers and other members of the community. This contention was not submitted to the jury because I concluded at trial, and adhere to the view now, that such acquiescence is not actionable under the Massachusetts statute. Although cancellation because of acquiescence when confronted with the public pressure of a vocal minority may be a breach of contract, it is not a violation of the Massachusetts Civil Rights Act. Neither

the cancellation nor the acquiescence, unaccompanied by conduct and intent as such was the subject of interrogatories 1, 2A, 2B, and 6, amounts to "threats, intimidation or coercion," which must be proved to establish a claim under the statute.

The jury's negative answers to interrogatories 1 and 2A, together with the court's ruling on the second theory, preclude any claim based upon the civil rights statute if claims under that statute are subject to jury trial, as Redgrave has contended. If instead, as BSO has contended, a plaintiff asserting a claim under the Massachusetts Civil Rights Act is not entitled to a jury trial, then this court must make fact findings on the subject matter of the first two interrogatories. Both parties have also taken an alternative position that this court should treat the jury's findings as merely advisory. In this event, the court would also have to make findings, although it could treat the jury's findings in answer to interrogatories 1 and 2A as advisory.

I conclude that I need not resolve the difficult and debatable question whether claims under the Massachusetts Civil Rights Act are subject to jury trial in Massachusetts courts, and, if not, whether such **[1193]** claims are nevertheless subject to jury trial in a federal court under the doctrine of *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 78 S.Ct. 893, 2 L.Ed.2d 953 (1958). If a jury trial is appropriate, the jury's verdict stands, amply supported by evidence. If jury trial is not appropriate, then acting entirely independently as factfinder on the evidence received in this case, I make the same findings as did the jury in answering interrogatories 1 and 2A. Also, acting as factfinder but treating the jury verdict as advisory, I make the same findings. I have explained these findings in more detail in a separate memorandum filed on this date pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. Thus, in all events, the questions submitted to the jury in interrogatories 1 and 2A are answered by the factfinder against the plaintiff Redgrave.

One further issue relevant to the civil rights claim is suggested by the testimony of one of BSO's trustees. That evidence would support a finding that one or more of BSO's trustees were con-

cerned that the Redgrave-BSO performances would impair BSO's ability to raise funds from the public. On the basis of this evidence, a factfinder might have found that agents of BSO cancelled the performances because of a concern over fundraising. Redgrave chose not to advance this contention at trial, but instead argued that all of BSO's suggested motivations were pretexts for retaliation against Redgrave because of her support for the PLO. BSO also chose not to argue that the cancellation was grounded in concern over fundraising.

It is understandable that neither party chose to press this issue. On one hand, any claim that motivation concerned with fundraising for a charitable corporation should be treated in the law as invidious lacks support in precedent. Nor could such a motivation satisfy the requirement of "threats, intimidation or coercion" in support of a claim under the Massachusetts Civil Rights Act. On the other hand, any defense that interests in fundraising would justify protective rules in any way analogous to the protection guaranteed by the First and Fourteenth Amendments (discussed in Part III of this opinion) likewise lacks support. A motivation concerned with fundraising is neither specially forbidden as invidious nor specially protected by constitutional constraints. In any event, in view of the positions taken by the parties at trial, fundraising as a motivation or a justification is not now at issue in this case.

For the foregoing reasons, I conclude that judgment must be entered for the defendant on the claim under the Massachusetts Civil Rights Act. Thus, I need not and do not address defendant's other contentions that Redgrave could not maintain a civil rights action even if she proved the factual premises underlying her claim.

Judgment will be entered for BSO on the state civil rights claim.

II.

BREACH OF CONTRACT CLAIM

The plaintiff's contract claim depends on whether defendant's cancellation constituted a breach of the contract and, if so, what damages are recoverable for that breach. To set the

context for determining the disputed issues of law bearing upon the claim for breach of contract, I take account of some relevant premises of the legal system.

A. PROTECTION OF FREEDOM IN THE LEGAL SYSTEM.

Protection of freedom is a prime objective of our legal system. Freedom of speech, freedom of artistic expression, freedom of contract, and freedom of choice on political and moral issues are among the protected activities. Implicit in the protection of freedom in these and other contexts is a conception of society in which pluralism may flourish. Individuals are free to be very different in their political and moral convictions, in their religious faiths, and in their artistic, social, and personal interests and activities. Individuals are free to come together in private organizations that express their personal interests, and the organizations that they create may be quite **[1194]** diverse. Individuals may, for example, come together for political expression, for the practice of religion or the profession of faith, to foster recreational interests, or to promote their common interests in music, drama, or some other form of art. They are free to create a private entity that promotes one special interest and seeks to remain pluralistic in other respects, bringing together individuals who share one special interest even though they differ sharply about other matters—political, moral, religious, or artistic.

The law does not forbid an entity organized to promote a form of art—or those who function as its managerial agents—from taking account of recognized differences among its members and patrons regarding controversial political issues. For example, it is not illegal for a private entity to make a choice not to contract with an artist for a performance if its agents believe that the artist's appearance under their sponsorship would be interpreted by others as in some degree a political statement. Thus, BSO was entirely free not to make a contract with Redgrave for such reasons even though its agents considered her a superb actress and exceptionally qualified to perform as narrator in Oedipus Rex.

Once BSO contracted for Redgrave to appear in the production of Oedipus Rex, BSO gave up part of its freedom. By contracting with a party, however, an entity does not entirely surrender all of its freedom to act. BSO retained to a certain extent its interests in freedom of expression and freedom of choice at least regarding conditions that in good faith it considered essential to an artistic production or the protection against physical risks. The freedom that BSO retained may even include freedom to break the contract (subjecting itself of course to liability for damages under the law) for any reason other than one specially forbidden by the law (for example, discrimination on grounds of sex or race). The suggested freedom to break a contract and suffer liability only for the legally recognized damages is within the scope of the idea often referred to as Holmes' bad man theory of contract law—that one who is willing to pay the penalty of such damages as the law assesses is free to break the contract and pay. See O.W. Holmes, *The Path of the Law*, 10 Harv.L.Rev. 457, 461-62 (1897). As to contracts not specifically enforceable in equity, the law provides no other remedy. Even if it is inappropriate to say that one has a legal "right" to break the contract and pay the assessed damages, legal redress is limited to those damages. Of course, if this point of view is accepted, one must determine the critical question as to the measure of damages under the law. The measure of damages clearly includes the performance fee less any expenses that would have been incurred to perform the contract. Does it also include compensation for harm to Redgrave's professional career in the circumstances of this case? This perspective does suggest, however, that unless plaintiffs can demonstrate that the consequential damages they seek are within the scope of legal redress for breach of contract, or can show that BSO's reason for cancellation is one forbidden by the law in a sense beyond merely being a breach of contract, BSO is free to break the contract without incurring liability beyond the performance fee.

As noted above, even though individuals and entities are free in various contexts to make choices for whatever reasons they find sufficient, the law does impose constraints against actions based upon reasons that are classified as invidious (illustrated

by discrimination on the basis of race or sex). Plaintiffs, of course, assert in this case that BSO cancelled for an invidious reason—retaliation against plaintiff because of her exercise of her right to speak freely on controversial political issues of worldwide concern. That contention was rejected by the jury in the answers to interrogatories 1 and 2A. As noted above, these findings are supported by the evidence. Thus, I need not consider whether an affirmative answer to one or both of these questions would have affected the [1195] measure of damages for breach of contract.

B. BREACH OF CONTRACT.

In analyzing plaintiffs' contract claim, I first turn to the question whether BSO's actions constituted a breach.

One component of the contract between plaintiffs and BSO is a written document sent to Redgrave by the BSO. (Exhibits 4 and 5). During trial, BSO claimed that under a clause in that document, the parties agreed that BSO could cancel the performances in circumstances that arose in this case without incurring liability to the plaintiffs. Interrogatory 3, submitting this contention, asked the jury whether BSO cancelled the performances because of "a cause or causes beyond the reasonable control" of BSO—the quoted phrase being taken from the contractual provision excusing performance. *See infra* Appendix 2 (instructions on interrogatory 3). The jury's negative answer is supported by evidence and defeats BSO's contention that its cancellation was not a breach of contract.

BSO's challenge on other grounds to the plaintiffs' claim for consequential damages does not in any way affect BSO's liability for the performance fee. As noted above, the law does not require that a producer enter into a contract without regard to the artist's political activities. Having entered into the contract, however, the producer may not break it without incurring liability for damages according to the law of contracts. Under the contract, plaintiffs were to receive a performance fee of $31,000, but were responsible for paying all travel expenses incidental to the engagement. The parties have stipulated that the net amount after expenses would have been $27,500. The

jury's answer to interrogatory 3 establishes that plaintiffs are entitled to judgment for this amount, at least, as actual damages for breach of contract.

C. CONSEQUENTIAL DAMAGES.

Plaintiffs argue that in addition to the performance fee they are entitled to consequential damages for Redgrave's loss of future professional opportunities caused by the breach of contract. Plaintiffs assert that the publicity of BSO's cancellation caused producers and theatre operators, who otherwise would have engaged Redgrave, not to do so. Under Massachusetts law, damages may be awarded for consequential harm if such harm was within the contemplation of the parties and was caused "directly" by the breach of [sic] "indirectly" by the combined effect of the breach and foreseeable intervening causes. *See, e.g., John Hetherington & Sons, Ltd. v. William Firth Co.*, 210 Mass. 8, 21, 95 N.E. 961, 964 (1911); *Monadnock Display Fireworks, Inc. v. Town of Andover*, 388 Mass. 153, 157, 445 N.E.2d 1053, 1056 (1983) (quoting *Hetherington*); *Abrams v. Reynolds Metals Co.*, 340 Mass. 704, 708-09, 166 N.E.2d 204, 207 (1960) (citing *Hetherington* and *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng.Rep. 145 (1854)).

Under the court's instructions, the jury could find that harm to Redgrave's professional career, of which BSO's cancellation was a cause, was "within the contemplation of the parties" at the time of making the contract if, on the basis of what BSO did know at that time about her public expressions and anything more that it then should have known in the exercise of reasonable care, BSO did foresee or should have foreseen that harm to her career from the cancellation was sufficiently likely that it would have been taken into account by an ordinarily prudent person in assessing the costs and benefits of entering into the contract at the time of making the decision to contract. *See infra* Appendix 1 (interrogatories 4A and 4B); *infra* Appendix 2 (instructions on interrogatories 4A and 4B). The jury found that consequential harm was foreseeable in this sense and that $100,000 would fairly and adequately compensate Redgrave for such harm (answers to interrogatories 4A, 4B, and 5).

BSO presents several arguments to support its motion for judgment notwithstanding the verdict on the consequential damages. The first two arguments attack the findings on the basis of insufficiency of the evidence presented by the plaintiffs. The **[1196]** remaining contentions assert that, even if the jury's verdict is supported by the evidence, this court must as a matter of law treat the finding of $100,000 in damages for harm to Redgrave's professional career as irrelevant to the judgment to be entered.

1. *Substantial Evidence Supporting an Award of Consequential Damages.*

First, BSO contends that the evidence was insufficient to support the jury's finding that harm to Redgrave's professional career was within the contemplation of the parties. I conclude that this contention is without merit.

Under Massachusetts law the legal standard as to what is within the contemplation of the parties includes consequences that were foreseeable to a person of reasonable prudence in the position of the party charged with the breach (BSO) at the time the contract was made. *Cf. John Hetherington & Sons, Ltd. v. William Firth Co.*, 210 Mass. 8, 21, 95 N.E. 961, 964 (1911) ("injured party shall be placed in the same position he would have been in, if the contract had been performed, so far as loss can be ascertained to have followed as a natural consequence and to have been within the contemplation of the parties as reasonable men as a probable result of the breach"). The evidence in this case was sufficient to support a finding that a reasonable person, having the knowledge of Redgrave's public expressions of political views that BSO had or should have had in the exercise of reasonable care at the time of contracting, would have foreseen harm to her professional career as a consequence of a cancellation by BSO.

Second, BSO contends that the evidence presented during trial was insufficient to support a finding as to any particular amount that is fair and reasonable compensation for harm to Redgrave's professional career—in other words, the plaintiffs have failed to prove with adequate certainty the damages

caused by BSO's cancellation. This issue involves the need to separate the effect of the harm caused by Redgrave's political expressions from any added harm caused by BSO's cancellation. BSO points to the general principle that plaintiffs have the burden of showing not merely a reduction of professional opportunities after BSO's breach as compared to those opportunities that would have been expected for one with Redgrave's qualifications as an actress; they must demonstrate the difference between the professional opportunities she had after the breach and the opportunities she would have had but for the breach. Thus, she must offer proof from which the jury could reasonably find, by a preponderance of the evidence, that her expressions on political issues would not have affected her professional opportunities but for the breach, or that the effect would have been more limited. BSO contends that the proof offered is too speculative to determine a reasonable award.

One response to these arguments points to instructive analogies in the precedents relating to tort actions for physical injuries to persons who have special susceptibilities to harm. Plaintiffs thus may invoke the rule that a wrongdoer takes the victim as is and therefore is liable for all of the harm resulting from aggravation of a pre-existing susceptibility to harm. *See generally Restatement (Second) of Torts* § 461 (1965). Nevertheless, the liability does not extend to harm that would have resulted from the pre-existing condition even if the tort had not occurred.

Although the issue presented as to the sufficiency of the evidence in this case is a close and debatable one, I conclude that the evidence is sufficient to support a finding that the BSO cancellation was a but-for cause of substantial harm to Redgrave's professional career and that $100,000 in damages is reasonable compensation for that harm. Plaintiffs' inability to prove the measure of the harm precisely does not defeat the claim under Massachusetts contract law. *See generally Rombola v. Cosindas*, 351 Mass. 382, 385, 220 N.E.2d 919, 922 (1966) ("In determining the amount of damages to be awarded, mathematical accuracy of proof is not required."); *National Merchandising Corp. v. Leyden*, 370 [1197] Mass. 425, 430, 348 N.E.2d 771, 774 (1976) ("It is recognized that 'an element of uncertainty in

the assessment of damages is not a bar to their recovery.' "). *See also Computer Systems Engineering, Inc. v. Qantel Corp.*, 740 F.2d 59, 67 (1st Cir.1984) (interpreting Massachusetts law).

2. *Legal Barriers to an Award of Consequential Damages.*

BSO argues also that, apart from requirements as to the contemplation of the parties and certainty of proof, consequential damages for harm to Redgrave's professional career are not recoverable as a matter of law. This contention invokes interests in freedom of expression that I address in Part III.

III.

LEGAL PROTECTION OF FREEDOM OF EXPRESSION

BSO contends that plaintiffs' claim for consequential harm to Redgrave's professional career implicates, first, constraints imposed by the First and Fourteenth Amendments to protect against intrusive state action, including judicially created state law rules that allow damages awards based upon communicative conduct, and, second, state law constraints aimed at protecting freedom of expression. These contentions require closer examination.

In the circumstances of this case, in order to establish that BSO's breach of contract caused loss of future opportunities for professional engagements, plaintiffs must prove that in some way information about BSO's action was communicated to others, that they thereafter acted differently because of the communicated message, and that BSO is legally responsible for harm caused by that communication and its consequences. These requirements are not independent elements of a cause of action for breach of contract. Instead, they emanate, by necessary implication, from a requirement of proof of causal connection between breach and harm; that is, in the context of this case, causal connection cannot be proved in any other way. Nonetheless, these corollaries of requiring proof of cause in the circumstances of the present case are closely analogous to rec-

ognized elements of the law of defamation—treated in that context as elements independent of theories of legal cause.

Judicial opinions resolving disputed claims in the law of defamation have exposed a clash among sets of interests that are all valued highly in the legal system. The clash of these highly valued interests remains, whatever the rubric of theory may be—whether, for example, it is "contemplation of the parties" or "proximate cause" rather than "privilege" incident to constitutional and other legal protections for freedom of expression.

As already noted, BSO invokes the First and Fourteenth Amendments on the factual premise that the evidence in this case would not support a finding that BSO's cancellation caused harm to Redgrave's career by any means other than some form of communication by BSO to others. In other words, the only possible mechanism of harm to Redgrave's professional career, revealed by the evidence, is the alleged influence of some statement made by BSO on later decisions of others—a statement of fact or opinion implied in BSO's cancellation, or express or implied in BSO's press release.

I conclude that BSO is correct in asserting that this factual premise is an inescapable element of the claimed causal connection between BSO's cancellation and consequential harm to Redgrave's professional career. The evidence does support the jury's finding, in answer to interrogatories 4A, 4B, and 5, that BSO's cancellation was a cause, along with other causes, of harm to her professional career for which $100,000 is reasonable compensation. But it does so only because a factfinder may reasonably infer that others, upon receiving the news of BSO's cancellation, interpreted the cancellation as conveying a message about Redgrave. No evidence was presented as to any means by which BSO's cancellation could cause others to deny her per-[1198]formance opportunities unless they first learned about the cancellation and derived some message from it.

The testimony regarding the one loss of an opportunity that was specifically identified at trial illustrates the point. The witness Theodore Mann testified that he decided against offering Redgrave a role in "Heartbreak House," playing at the Circle in the Square Theater in New York, because of BSO's

cancellation. His explanation was, in essence, that if BSO couldn't take the risk, neither could he.[1] The necessary implication is that he interpreted BSO's cancellation as saying BSO has decided it could not take the risk of presenting Redgrave in a live performance for one or more of the reasons to which he alluded, including concerns about fundraising, ticket sales, and physical disturbance of the performances.

At various points during the trial—for example, when the potential relevance of proffered evidence was at issue (*e.g.*, Transcript, October 31, 1984, Vol. 9, Morning Session, pp. 63-65, 68-72, 78-79; Transcript, October 30, 1984, Vol. 8, pp. 99-101, 105-113; Transcript, October 25, 1984, Vol. 5, pp. 17-32), as well as in consultations concerning the interrogatories to be submitted to the jury (*e.g.*, Transcript, November 1, 1984, Vol. 10, Afternoon Session, pp. 41-45; Transcript, November 2, 1984, Vol. 11, pp. 167-75; Transcript, November 6, 1984, Vol. 13, Morning Session, pp. 52-62; Transcript, November 6, 1984, Vol. 13, Noon Lobby Conference, p. 29)—plaintiffs' counsel were invited to make a proffer of any factual and legal theories that would support any other mechanism or sequence by which a connection could be shown between BSO's cancellation and

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1 In answer to a question as to why he decided against hiring Redgrave, Mann said:

> The Boston Symphony Orchestra had canceled, terminated Ms. Redgrave's contract. This had a—this is the premier or one of the premier arts organizations in America who, like ourselves, seeks support from foundations, corporations, individuals; have subscribers, sell individual tickets.
>
> I was afraid that and those in my organization were afraid that this termination would have a negative effect on us if we hired her. And so we had conferences about this. We were also concerned about if there would be any physical disturbances to the performance.
>
> And there were many long discussions about this with myself, my partner, Paul Libin, Rex Harrison who was the star of the show and had cast approval, and Anthony Page who was the director. And it was finally decided prior to the meeting with Ms. Redgrave in September of '83 that we would not hire her because of all of the events that had happened, the cancellation by the Boston Symphony and the effects that we felt it would have on us by hiring her.

Transcript, October 31, 1984, Vol. 9, Afternoon Session, pp. 24-25.

Redgrave's later loss of one or more professional opportunities that she claims she would have been offered but for the BSO cancellation. All factual hypotheses advanced had one characteristic in common. Expressly or impliedly, they depended on the decision of another person, who otherwise would have offered Redgrave a performance opportunity, not to do so because that other person was influenced by some message he or she derived from the BSO cancellation and the press coverage that followed. With understandable zeal of advocacy, plaintiffs' counsel phrased their hypotheses in ways that did not explicitly identify any communicative step in the sequence of causation. Yet, close analysis revealed its presence in every hypothesis advanced. The imagery of a chain of causation is apt here. Though the stated hypotheses did not express the communicative link in the chain of causation, there is in every hypothesis advanced a missing link unless the communication of some message from BSO to others can be found. The presence of this communicative link invokes the analogy to the law of defamation.

Under the law of defamation, at least as applied to media defendants, a public figure plaintiff may not recover damages unless he or she can establish clearly and convincingly that the defendant had knowledge of the falsity or acted in reckless disregard of the truth of the defamatory matter published. *See, e.g., Gertz v. Robert Welch, Inc.*. 418 U.S. 323, 342, 94 S.Ct.[1199] 2997, 3008, 41 L.Ed.2d 789 (1974). The Supreme Court has not yet determined whether these protections are also available to non-media defendants. *See Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414, *cert. granted*, ____ U.S. ____, 104 S.Ct. 389, 78 L.Ed.2d 334 (1983) (argued Mar. 21, 1984, reargued Oct. 3, 1984). Even if they are not, however, state law protects against liability for harm caused by truthful statements of fact about a person. *See, e.g., Restatement (Second) of Torts* § 581A (1977).

The suggested analogy to defamation cases adds substantial weight to the defense position that the judgment in this case should not include damages for consequential harm. If a judgment for such damages were entered, pursuant to this court's enforcement of state law, that application of state law would

constitute state action to which Fourteenth Amendment constraints (and First Amendment constraints through Fourteenth Amendment incorporation) would apply. *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254, 256, 276-78, 84 S.Ct. 710, 713, 723-24, 11 L.Ed.2d 686 (1964). The debatable issues as to whether federal constitutional constraints and state constitutional and decisional constraints against state law defamation awards would be extended to state law awards for consequential harm as to which a communicative link is essential to the causal chain are issues of first impression. But the analogy is compelling.

Plaintiffs contend that the analogy to defamation cases should be rejected. They argue that the interests they assert here, in contrast with those asserted by a plaintiff in a defamation case, are of the type that ranks highest in the First Amendment hierarchy—Redgrave's interests in freedom of expression and freedom from retaliation against her because of her openly expressed political views. Extending the notion of retaliation to harm to Redgrave's professional career caused by publicity generated by BSO's cancellation, plaintiffs have explicitly referred to the interests they assert here as "First Amendment" rights. In fact, the alleged intrusions upon plaintiffs' interests in freedom of expression are not intrusions against which the First Amendment (or the Fourteenth by incorporation of the First) affords protection. The First and Fourteenth Amendments protect only against governmental intrusion. *See, e.g., Hudgens v. NLRB*, 424 U.S. 507, 513, 96 S.Ct. 1029, 1033, 47 L.Ed.2d 196 (1976) (First Amendment); *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 114, 93 S.Ct. 2080, 2092, 36 L.Ed.2d 772 (1973) (same); *Blum v. Yaretsky*, 457 U.S. 991, 1002, 102 S.Ct. 2777, 2784, 73 L.3d.2d 534 (1982) (Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948) (same). The intrusion alleged in this case is an intrusion by a private entity—BSO. Nonetheless, the interests in freedom of expression that plaintiffs assert are highly valued in our legal system. First and Fourteenth Amendment protections against governmental intrusions are only part of the total array of legal protections of freedom of expression.

Even though incorrectly characterized by plaintiffs as invoking First Amendment rights, their argument as to the high value the law places on Redgrave's interests in freedom of expression is cogent. Their argument shows at least that the issue presented in this case is not directly controlled by precedent—that it is truly one of first impression. The defense argument, fairly appraised, shows not that logic requires the denial of consequential damages but that the analogy of defamation suggests it.

It is debatable whether interests in free expression generally would be more effectively protected and promoted if the legal system awarded damages in the circumstances presented here, to vindicate compelling interests in free expression (represented by the plaintiffs in this instance), even though doing so would to some extent impair interests in free expression, or interests in freedom of action with communicative implications (represented by defendant **[1200]** in this instance). If the issue is framed in terms of which outcome is more likely to serve and promote freedom of expression in the long run, the answer is unclear. Certainly a rule of law allowing consequential damages would deter breach. But it would deter contract as well. It is a question open to debate whether in the long run artists who openly express their political views would be offered more performance opportunities if such a rule were clearly established as applicable law. I conclude that the issue concerning the law applicable to claims of consequential harm such as this one, when squarely presented to the courts of last resort—state and federal—will be resolved on other grounds and not by answering this debatable question about the net impact of different rules of law on freedom of expression by performing artists.

A more compelling ground for resolving the issue is that legal constraints protecting freedom of expression are primarily designed as a shield, not a sword. They may be invoked generally in defense of freedom and only rarely to sustain an action for damages. The legal system stands ready to shield freedom against unlawful governmental intrusion, but reluctant to use the sword of damage to vindicate one claim of freedom by striking down another. *Cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 920-32, 102 S.Ct. 3409, 3430-36, 73 L.Ed.2d 1215

(1982) (holding that First Amendment principles preclude recovery under state law for damages caused by speech or other protected conduct).

In a system of equal justice, a conception of freedom that depends upon repressing equal freedom of others is self-contradictory. In relation specifically to freedom of expression—whether political or nonpolitical, artistic or banal, vital or frivolous—invoking the compulsion of law to compensate for the impact of one exercise of freedom upon another would be in the long run self-defeating. Inevitably it would draw the legal system into making judgments about the content of expression—the very kind of governmental action that is most threatening to individual freedom.

I conclude that the analogy to defamation cases is compelling. Predicting the resolution of issues in courts of last resort, as I must do in order to determine the judgment to be entered in this case, I conclude that both state and federal constraints against damages awards will be imposed by the courts of last resort when these issues are presented for decision, and that these constraints bar the plaintiffs' claim for consequential damages in the circumstances of the present case.

I conclude further, that one of these legal constraints upon awards of damages is that a plaintiff who seeks an award for harm connected with the wrongful act of the defendant through a communicative link must show at least that the communicative link involved some unprivileged statement. Absent such a showing, the causal connection between wrong and harm is broken because an essential link of the chain is itself legally protected expression. Thus, a plaintiff who seeks to use a communicative link as a part of the chain of causation must disentangle actionable expression from protected expression in that communicative link. This conclusion is supported not only by analogy to the law of defamation but also by analogy to *Claiborne Hardware*, 458 U.S. at 915-18, 102 S.Ct. at 3427-28 (state tort law may compensate a retailer for loss of customers intimidated by defendants' violence but the First and Fourteenth Amendments preclude an award that includes as well compensation of loss of customers dissuaded from trading by protected speech and political activity).

The communicative link may, of course, be either a statement of fact or a statement of opinion. Each statement of fact or opinion may be express or it may be implied. If a statement of fact, it may be true or it may be false. If a statement of opinion, it may be an opinion that BSO's managerial agents did in fact hold, or it may be one they did not hold. Will any of the communicative links that now remain as factual **[1201]** possibilities, after taking account of the jury's answers to interrogatories, sustain liability for consequential harm to Redgrave's professional career?

Accepting the analogy to the law of defamation, I conclude, first, that plaintiffs are not entitled to harm caused by any message conveyed by BSO's cancellation if in substance that message was no more than a statement of fact about Redgrave that is not shown to be false or a statement of opinion that was in fact held. Second, even if some element of the message was a false statement of fact about Redgrave or a statement of opinion not in fact held, additional barriers to liability must be overcome before an actionable claim for harm to Redgrave's professional career is established. Plaintiffs must prove that the harm was caused by some impermissible element or elements of the message rather than by legally privileged expressions of fact or opinion. As stated above, disentangling privileged from actionable expressions is a burden that plaintiffs must meet to establish liability for harm to Redgrave's professional career.

Viewed in the perspective of the defamation analogy, this claim is brought by and on behalf of a person who is a "public figure" both because of her acknowledged recognition as an actress and because of her having voluntarily expressed her views openly on political issues of worldwide interest and concern. Consultations between the court and counsel, during preparation of the charge to the jury, disclosed that on this point there is no dispute. Thus, in whatever way the communicative content of BSO's actions may be described, as a formulation of the contention that BSO's cancellation foreseeably caused Redgrave to lose professional opportunities that would otherwise have been available to her, the legal argument for allowing damages for the resulting harm must overcome BSO's claim of freedom to act as it did, in order to serve the artistic

and security interests that it alleges as a basis for its actions, even though its action implicitly had communicative consequences of harm to Redgrave's professional career. Because the analogy to the law of defamation is apt, it is a likely prediction that the higher courts where this unsettled issue must ultimately be resolved will hold that plaintiff can succeed in this burden only by showing that BSO has impliedly communicated to others some material statement of fact (and not merely opinion) about Redgrave that it knew to be false, or that BSO acted with reckless disregard for the truth or falsity of a material statement of fact it impliedly communicated. *Cf. Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 94 S.Ct. 2997, 3008, 41 L.Ed.2d 789 (1974) (public figure "may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth.").

In the present case, harm to Redgrave's career resulting from any implied statement about her—including any statement about the extent of her public expression on political issues—plainly would not be actionable if the statement was true. Plaintiffs were invited to call to the court's attention any factual hypothesis, supported by evidence, involving a false statement of fact about Redgrave that was allegedly implied in BSO's cancellation and press release. The best efforts of plaintiffs' counsel to respond to this invitation were incorporated in five formulations they submitted to the court near the close of extended consultations on this subject. These were proposed as statements that might be placed before the jury as a basis for interrogatories asking the jury to determine whether or not any such statement was impliedly communicated by BSO's cancellation and press release and, if so, whether the statement was false and whether BSO knew it to be false or acted with reckless disregard for its truth or falsity. The five formulations were as follows:

> 1. Because Vanessa Redgrave was engaged to narrate the "Oedipus Rex" centenary concerts, those concerts were irreparably wrecked and had to be cancelled.

[1202] 2. Vanessa Redgrave's politics created such turmoil, disturbance and opposition that the Boston Symphony Orchestra's centenary "Oedipus Rex" concerts were irreparably wrecked and had to be cancelled.

3. Vanessa Redgrave's engagement to play the role of narrator in the Boston Symphony Orchestra's "Oedipus Rex" centenary concerts caused the concerts to be cancelled because the Boston Symphony Orchestra received threats both to disrupt the performance and to withhold significant financial support if she appeared, many performers refused to perform if she appeared and the artistic integrity of the performance would have been compromised if she appeared.

4. Vanessa Redgrave could not be permitted to appear in the role of narrator of the "Oedipus Rex" centenary concerts because to permit her to appear in those concerts would pose unacceptable risks to the audience, to the musicians and to Symphony Hall.

5. Vanessa Redgrave cannot be hired to perform without wrecking a production and no measures can be taken to protect against such damage.

Plaintiffs' Proposed Inserts for Special Interrogatories, Docket No. 268 (Nov. 6, 1984).

Close analysis reveals that each of these formulations of some message allegedly conveyed by the BSO cancellation includes one or more opinions. None of these formulations disentangles from opinion a statement of fact about Redgrave that with support in evidence, the jury could find to be false and to have been made with knowledge of falsity or with reckless disregard for its truth or falsity.

I do not fault plaintiffs' counsel for their inability to produce any formulation that might appropriately have been submitted to the jury. Rather, the compelling conclusion is that the evidence would not support any such formulation. I concluded then, and adhere to the conclusion now, that affirmative answers to the questions proposed by plaintiffs (whether BSO's cancellation and press release impliedly conveyed any of the

messages described in the formulations stated above) would provide no basis for a judgment for plaintiffs. Such findings would not identify any statement of fact about Redgrave. Moreover, the proposed submissions wholly fail to disentangle any factual statement that might also, with support in evidence, have been found to be false, and the statement of which might itself have been found to be a cause of harm.

Thus, plaintiffs failed entirely to meet their burden of identifying any way of disentangling protected expression from a form of expression that even arguably might be actionable.

I turn, finally, to possible hypotheses about expressions of opinion as part of the communicative link between BSO's cancellation and harm to Redgrave's career.

The Supreme Court has declared that opinion statements are constitutionally protected. "Under the First Amendment there is no such thing as a false idea." *Gertz*, 418 U.S. at 339, 94 S.Ct. at 3007.

Relevant sections of the *Restatement (Second) of Torts*, drafted after *Gertz* and with painstaking attention to the implications of *Gertz*, call attention to the possibility that a statement in opinion form may impliedly state facts. *See Restatement (Second) of Torts* §§ 566, 581A comment c (1977). In this case, however, as noted above, plaintiffs have wholly failed to identify any statement of fact that can be disentangled and treated as a basis for a claim.

It may also be argued that a legally cognizable claim could be established by proof that BSO made a statement that it held an opinion which in fact it did not hold. (For convenience I refer to the opinion of BSO rather than to the opinion of its managerial agents. The charge to the jury dealt with this matter by including instructions on a state of mind requirement as applied to a corporation. *See infra* Appendix 2 (instructions on interrogatory 6).).

[1203] In the face of *Gertz*, it is a dubious contention that damages may be awarded for harm caused by a false statement that the speaker holds an opinion that in fact the speaker does not hold. One may read *Gertz* as indicating that the Supreme Court has determined that an unacceptable chilling of expression would result if one were subject to litigation of claims on

this ground. That is, one may read *Gertz* as saying that opinion statements are not actionable, even upon a showing that the person expressing the opinion did not in fact hold that opinion. *See Gertz*, 418 U.S. at 339-40, 94 S.Ct. at 3006-07. I need not address that question in this case, however. For the explicit purpose of determining whether the facts of this case presented such a legal issue for decision, plaintiff's counsel were invited to submit proposed interrogatories that would identify any potentially actionable statement of opinion that a factfinder might have found, with support in evidence, to have been stated even though not held by BSO and to have been a causal link between BSO's cancellation and harm to Redgrave's career. The plaintiff's proposals wholly failed to disentangle any such opinion from protected expression. Consultation over these proposals did, however, lead to the formulation of the questions that were submitted as interrogatories 11A, 11B, and 11C. The jury's negative answer to interrogatory 11A leaves plaintiff with no factual basis, even on this legally tenous theory, for a claim of consequential harm caused by BSO's falsely stating an opinion it did not hold.

In summary, analogies to *Claiborne Hardware* and to precedents regarding claims for defamation support the conclusion that, on the evidence presented and the findings of the jury in answers to interrogatories 1, 2A, and 11A, plaintiffs' claim for consequential harm to Redgrave's professional career must be denied. The jury's answers to interrogatories 4A, 4B, and 5 (finding $100,000 in damages for harm to Redgrave's professional career) are therefore irrelevant, as a matter of law, to the judgment to be entered.

IV.

Judgment will be entered for plaintiffs, on the breach of contract claim, in the amount of $27,500, and for defendant as to all other claims.

On November 16, 1982, defendant made a Rule 68 offer of judgment in the amount of $31,000. *See* Fed.R.Civ.P. 68. Judgment finally obtained by plaintiff being "not more favor-

able than the offer," costs will be assessed in conformity with Rule 68. The parties are directed to confer about the specific amount due and are directed to report within ten days whether or not they are able to agree. The Clerk is directed to withhold entry of final judgment pending the report from counsel.

APPENDIX 1

VERDICT

1. Was the only reason, or the primary reason, that the Boston Symphony Orchestra (BSO) cancelled the arrangements for Vanessa Redgrave to appear in the performances of Oedipus Rex, in which Vanessa Redgrave was to appear as narrator, that the agents who acted for the BSO in making the decision to cancel disagreed with political views that Vanessa Redgrave had publicly expressed?

Answer YES or NO. NO

2A. Did one or more of the agents of the BSO take a position in favor of cancellation of the arrangements because of disagreement with political views that Vanessa Redgrave had publicly expressed?

Answer YES or NO. NO

IF YOU ANSWERED YES TO QUESTION 2A, ANSWER THE FOLLOWING. IF YOU ANSWERED NO TO QUESTION 2A, SKIP QUESTION 2B.

2B. Do you find that the BSO would not have cancelled the arrangements but for the influence of that position taken by the BSO's agent or agents? Check the appropriate box.

YES, they would not have cancelled ☐

NO ☐

[1204]

IF YOU ANSWERED YES TO QUESTION 1 OR YES TO BOTH PARTS OF QUESTION 2 OR YES TO ALL THREE, SKIP QUESTION 3. IF YOU HAVE ANSWERED NO TO

QUESTION 1 AND NO TO EITHER PART OF QUESTION 2, ANSWER QUESTION 3.

3. In cancelling the arrangements for Vanessa Redgrave to appear in performances of Oedipus Rex, did BSO do so because of a cause or causes beyond the reasonable control of the BSO?

Answer YES or NO. NO

IF YOU HAVE ANSWERED NO TO QUESTION 1, NO TO EITHER PART OF QUESTION 2, AND YES TO QUESTION 3, SKIP ALL REMAINING QUESTIONS. OTHERWISE, PROCEED TO QUESTION 4A.

4A. Did BSO's cancellation of the arrangements for Vanessa Redgrave to appear in performances of Oedipus Rex cause consequential harm to her professional career?

Answer YES or NO. NO

IF YOU HAVE ANSWERED NO TO QUESTION 4A, SKIP QUESTION 4B. IF YOU HAVE ANSWERED YES TO QUESTION 4A, ANSWER QUESTION 4B.

4B. Was harm to Vanessa Redgrave's professional career a foreseeable consequence within the contemplation of the parties at the time they entered into the contract?

Answer YES or NO. NO

IF YOU ANSWERED NO TO QUESTION 4A OR NO TO QUESTION 4B, SKIP QUESTION 5. OTHERWISE, ANSWER THIS QUESTION.

5. What amount, if any, of money paid now in cash, is required to compensate plaintiffs fairly and reasonably for any harm to Vanessa Redgrave's professional career that you find by a preponderance of the evidence was caused by BSO's cancellation of the arrangements for Vanessa Redgrave to appear in performances of Oedipus Rex?

Answer in DOLLARS or NONE. $100,000

IF YOU HAVE ANSWERED NO TO QUESTION 1 *AND* NO TO EITHER PART OF QUESTION 2, SKIP QUESTIONS 6-10. OTHERWISE, PROCEED TO QUESTION 6.

6. Did the BSO or its agents, in March and April 1982, threaten, intimidate or coerce Vanessa Redgrave for the purpose of interfering with or attempting to interfere with her civil right to free expression of her political views?

Answer YES or NO._____

7. Do you find that the BSO would not have cancelled the arrangements for Vanessa Redgrave to appear in performances of Oedipus Rex but for the fact, if you find it to be a fact, that one or more of the BSO's trustees opposed Vanessa Redgrave's political views and wanted to retaliate against and punish her for those views and to coerce and intimidate her into becoming less outspoken in her views?

Answer YES or NO._____

IF YOU HAVE ANSWERED NO TO QUESTION 6 *AND* NO TO QUESTION 7, SKIP QUESTIONS 8-10. OTHERWISE, PROCEED TO QUESTION 8.

8. What amount, if any, of money paid now in cash is required to compensate Vanessa Redgrave fairly and reasonably for any harm that you find by a preponderance of the evidence was suffered by her as a consequence of the BSO's interference with her civil rights through its threat, intimidation or coercion?

Answer in DOLLARS or NONE._____

IF YOU ANSWERED WITH A DOLLAR AMOUNT OTHER THAN NONE TO QUESTION 5 *AND* ANSWERED QUESTION 8 WITH A DOLLAR AMOUNT OTHER THAN NONE, ANSWER THE FOLLOWING QUESTION. OTHERWISE, SKIP THIS QUESTION.

9. What amount, if any, of the sum you found in answering Question 8 is for harm to Vanessa Redgrave's professional career **[1205]** that you took into account in answering Question 5?

Answer in DOLLARS or NONE._____

IF YOU ANSWERED QUESTION 8 WITH A DOLLAR AMOUNT OTHER THAT NONE *AND* DID NOT ANSWER

QUESTION 5, OR ANSWERED QUESTION 5 NONE, ANSWER THE FOLLOWING QUESTION. OTHERWISE, SKIP THIS QUESTION.

10. What amount, if any, of the sum you found in answering Question 8 is for harm to Vanessa Redgrave's professional career?

Answer in DOLLARS or NONE._____

IF YOU HAVE ANSWERED NONE TO QUESTION 5, AND NONE TO QUESTION 10, SKIP QUESTION 11. OTHERWISE, ANSWER QUESTION 11.

11A. Did BSO's cancellation and press release impliedly state to others that BSO's managerial agents held the opinion that Vanessa Redgrave was so controversial because of her publicly expressed political views that the risks associated with the series of performances in Boston and New York, in which she was to appear as narrator, were too great to be acceptable to a prudently managed symphony orchestra?

Answer YES or NO. NO

IF YOU HAVE ANSWERED NO TO QUESTION 11A, SKIP ALL REMAINING QUESTIONS. OTHERWISE, PROCEED TO QUESTION 11B.

11B. If so, do you find that in fact BSO's managerial agents did not hold that opinion? Check the appropriate box.

YES, they did not so hold ☐

NO ☐

11C. What amount, if any, of the damages you found was caused by harm to Vanessa Redgrave's professional career that she would not have suffered if this statement as to the opinion of BSO's managerial agents had not been made?

Answer in DOLLARS or NONE._____

APPENDIX 2

Charge to the Jury

MEMBERS OF THE JURY:

It is now time for me to give you instructions on the law. To help you understand and remember the instructions, I will divide them into two main parts: first, general instructions, intended to guide you throughout your deliberation, second, instructions about the claims and defenses in this case.

Part I

. . . .

Part II

The Contract Claim

It is undisputed that the BSO and Vanessa Redgrave entered into a contract that provided for Vanessa Redgrave to appear as narrator in live BSO performances of Oedipus Rex (three performances in Boston and two in New York). The parties agree that one component of the contract is a written document sent to Vanessa Redgrave by the BSO (Plaintiffs' Exhibits 4 and 5). This document was not signed. The parties agree, however, that the orally agreed to a contract including the terms stated in the written document. They do not agree as to whether or not any additional terms were part of the oral agreement. The two disputed issues that bear upon this law suit are (1) the interpretation of the cancellation clause contained in the written agreement sent to Vanessa Redgrave by the BSO; and (2) what damages for the breaking of the contract were "foreseeable consequences within the contemplation of the parties" at the time the contract was made. I will further explain these issues and terms after I give you some general instructions about contracts.

A "contract" is an agreement between two or more persons called "parties" to do or not do a certain thing. A contract may

be either "express" or "implied," or partly express and partly implied.

[1206] An "express" contract is one the terms of which are stated in words. An express contract may be oral as well as written. It is simply a verbalized agreement between the parties to do or not to do a certain thing for a "consideration." Mutual promises are sufficient "consideration."

An essential element of an express contract is the mutual consent of the parties that is communicated by each party to the other party.

Consent is not mutual unless the parties agree upon the same terms and conditions in the same sense. Consent can be effectively communicated only by some act or omission which is intended to communicate consent, or which indicates to the other party (or parties) that it is intended to communicate consent.

An implied contractual term is one which is not expressly stated in the contract but which, from the sense of the agreement as a whole, appears to have been intended by the parties to be a part of their contract.

When part or all of an agreement is written, you may consider any evidence as to which party drafted it, and if you find a relevant provision to be ambiguous, you may resolve ambiguity against the drafter, subject of course to your resolving it in a way that is a reasonable interpretation.

Resolving Disputes as to the Terms of a Contract

The basic guideline in deciding what the terms of the contract are is the stated understanding and stated intent of the parties at the time they entered into the contract. The stated intent of the parties is determined by considering the relationship of the parties, what they said and did when entering into the contract, and all of the circumstances in which they entered into the contract as shown by the evidence before you.

When a contract is entirely written, or when there is no dispute about what was said by the parties when they orally agreed to a contract, the interpretation of that contract is ordinarily a matter of law for the court to decide. However, when the agree-

ment was at least partly oral and determining exactly what was said and in what context depends on weighing evidence, it may be necessary for the jury to resolve some dispute as to the terms of the contract. This is such a case. In doing this, you must, of course, follow the instructions of the court as to the applicable law.

In resolving a dispute about any term or terms of a contract in this case, you are to be guided by the following rules:

First. A contract must be viewed as a whole and construed so that each clause helps to interpret the other.

Second. The words used in a contract are to be understood in their ordinary and popular sense, unless there is evidence that the parties intended to give them some different meaning.

Third. A contract should be given a reasonable interpretation and one which effectuates the parties' mutual intent as they manifested it.

Fourth. The manifested intent of the parties may be determined by their acts and expressed understandings.

Reasons for Cancellation and Their Bearing on Liability and Damages

The first three questions I am submitting to you concern contentions of the parties regarding reasons for the BSO's cancellation of the arrangements for Vanessa Redgrave to appear in performances of Oedipus Rex.

The BSO claims that it cancelled the arrangements for Vanessa Redgrave's appearance in the performances of Oedipus Rex for causes beyond the reasonable control of the BSO. The BSO claims that a clause contained in the written form of agreement which they sent to Vanessa Redgrave allowed them to do so in the circumstances that arose in this case.

Vanessa Redgrave and Vanessa Redgrave Enterprises, Ltd., as plaintiffs, claim that the cause of the cancellation of those arrangements was entirely within the control of the BSO. Thus, they contend that the clause to which I referred does not[1207] excuse the BSO's actions. They claim, instead, that BSO can-

celled for reasons with which Questions 1 and 2 are concerned. Question 3 on the verdict form asks you to determine if the cause or causes of the cancellation was beyond the reasonable control of the BSO.

It is for you to determine which of these positions of the parties is supported by the evidence before you. Questions 1, 2, and 3 concern what you find to have been reasons for BSO's cancellation. After reading the questions to you, I will explain what I mean by some of the words and phrases appearing in the questions.

Now, I will read Questions 1 and 2.

[Read Questions 1 and 2]

You will note that the terms "agent" and "agents" are used in Questions 1 and 2. Also, Question 2 and other questions later ask about actions or decisions "of the BSO." And Question 1 uses the phrase "the agents who acted for the BSO in making the decision."

These words and phrases require some explanation.

Acts of a Corporation

The BSO is a private, non-profit charitable corporation organized under Massachussetts law to promote the performance and enjoyment of music. A corporation is in law a person, but of course it cannot act otherwise than through its trustees, or officers, or other agents. The law therefore holds a corporation responsible for all acts of its trustees, or officers, or other agents, if those acts are done within the scope of their authority.

Every act of every trustee, or officer, or other agent, on behalf of, or in the name of a corporation, if done within the scope of his authority, is in law the act of the corporation itself.

To be within the scope of authority, an agent's acts must be done in the ordinary course of some part of the business or affairs of the corporation that the particular agent is authorized to do on behalf of the corporation.

[1207] A single trustee of a corporation does not have authority to make a decision for the corporation. Of course, he has authority to participate in deliberations about a decision

that is to be made either by a vote of trustees or by an officer or agent to whom authority to make the decision has been delegated, and if he does so participate, then he is an agent acting within the scope of his authority as to his participation in deliberations, even though having no authority to make the decision.

Authority to act for a corporation in a particular matter, or in a particular way or manner, may be inferred from the facts and circumstances shown by the evidence in the case. That is to say, authority to act for a corporation, like any other fact in issue in a case, need not be established by direct evidence, but may be established by indirect or circumstantial evidence.

Question 1 asks you about the state of mind of the agents who acted for the BSO in making the decision to cancel—that is, the state of mind the agents who had the authority to make the decision to cancel and exercised that authority. Was their only reason or primary reason for cancelling the arrangements for Vanessa Redgrave's appearance that they disagreed with Vanessa Redgrave's political views? It is not enough for plaintiff to show that those agents disagreed with her political views. You can answer Question 1 YES only if you find from a preponderance of the evidence, first, that the agents who were authorized to and did make the decision disagreed with her political views and, second, that this was the only reason or the primary reason they made the decison to cancel.

Question 2A asks if because of disagreement with Vanessa Redgrave's political views, one or more agents, during consultations on the matter, took a position in favor of cancellation. If so, Question 2B asks, would the decision by the agent or agents having authority to make that decision not have been made but for the influence of that position in favor of cancellation?

[1208] In explaining Question 1, I said that it asks about a state of mind concerned with reasons for cancellation—the state of mind of the agent or agents who had authority to and did make the decision to cancel.

Because motive or reason or reasons for acting is a state of mind, you must find, by a preponderance of the evidence, that in fact that state of mind existed. Thus, it is not enough to find that other persons with whom that person associated had that

state of mind. The question is whether the agent whose state of mind you are considering had that state of mind. Of course, you may infer reasons or motives by considering both the direct and the circumstantial evidence bearing on that issue.

Question 1 asks you about the state of mind of the agent or agents who were authorized to and did in fact make the decision to cancel.

Question 2A, in contrast, asks you about the state of mind of an agent or agents who took a position in the discussion that preceded the decision, whether or not that agent or agents was authorized to make the decision. Thus, Question 2 asks about the influence, if any, of that position on the decision made by the agent or agents with authority to decide.

If you find by a preponderance of the evidence that BSO's primary reason or only reason for cancelling was that the agent or agents acting for BSO in making the decision to cancel disagreed with political views that Vanessa Redgrave had publicly expressed, you will answer Question 1 YES. Otherwise, answer it NO.

If you find by a preponderance of the evidence that one or more agents of BSO took a position in favor of cancellation because of disagreement with political views that Vanessa Redgrave had publicly expressed, you will answer Question 2A YES. Otherwise, answer it NO.

If you find that BSO would not have cancelled but for the influence of that position taken by the BSO's agent or agents, you will answer Question 2B YES. Otherwise, answer Question 2B NO.

To express this another way: if one or more of BSO's agents took this position but that did not influence BSO's decision because BSO would have cancelled anyway, for other reasons, then plaintiff has failed to prove that this position of one or more agents was a legal cause of the decision.

To repeat, then, if you find that BSO would not have cancelled but for an agent's or agents' position in favor of cancellation because of opposition to Vanessa Redgrave's political views, you will answer YES to Question 2B. Otherwise, answer NO.

If you answer YES to Question 1 or YES to both parts of Question 2 or YES to all three, you will have found that BSO cancelled because of a cause within its reasonable control. In that event, the instruction before Question 3 tells you to skip Question 3. Otherwise, you will answer Question 3.

Causes Beyond the Reasonable Control of a Party to a Contract

I will now read Question 3 on the verdict form.

[Read Question 3]

The BSO claims that under a clause contained in the written form of agreement which they sent to Vanessa Redgrave, the parties understood that the BSO could cancel the performances in the circumstances that arose in this case. Here is the wording of that clause:

> In case either of the parties to this Agreement shall be prevented from performing or carrying out any of its obligations hereunder by any cause beyond such party's reasonable control, including but not limited to illness, any act of God, strike, labor dispute, fire, flood, or public disaster, it is understood and agreed that there shall be no claim for damages by the other party in consequence of said non-performance. In such event, however, this Agreement shall remain in full force and effect to the extent that it can be performed. Without limiting the generality of the foregoing, if as a result of any cause **[1209]** beyond the reasonable control of the Orchestra, the cancellation or suspension of the concert season or any portion thereof, or the weeks of tour and Festival weeks, or any concert is required there shall be no liability upon the Orchestra by reason of such cancellation or suspension.

This clause means that the BSO can cancel the contract or suspend its performance without incurring any liability if the reason for the cancellation is an event or events beyond its reasonable control which occur after the making of the contract which prevent the parties from carrying out their manifested intent.

If a private organization makes a contract with an artist, and, when doing so, knows or in the exercise of reasonable care should know that the artist has made controversial political statements, then the private organization is bound by its choice. It may not back out of the contract merely because of criticism or pressure from others growing out of their opposition to the artist's political views unless it is willing to pay for the harm caused by such an action. Thus, it is not a "cause beyond the reasonable control" of the BSO, as that phrase was used in the contract, if you find that, when the BSO entered into a contract with Vanessa Redgrave for her to appear as the narrator in performances of Oedipus Rex, the agent or agents who acted for BSO in making the contract knew, or in the exercise of reasonable care should have known, that she had made public statements on controversial political issues, and that the BSO later received expressions of disapproval and protest that were stronger or more heated or agitated than they expected on the basis of which they concluded that the likelihood of disruption of performance was greater than they had expected when entering the contract.

If, however, you find that the reaction was so extreme that it was not reasonably foreseeable, you may take that into account in determining your answer to this question.

You must decide whether events had occurred or facts existed at the time the BSO cancelled the arrangements for Vanessa Redgrave to appear in performances of Oedipus Rex which the parties could not remedy, which were therefore beyond their reasonable control and which prevented the performances from going forward as planned. In doing so, you must bear in mind that any cancellation or suspension pursuant to the clause must be based on events that have occurred which rendered performance impossible or impracticable. Invocation of the clause may not be based on speculation, but reasonable apprehension about the risks of future events occurring based upon events that have occurred, may be taken into account in determining whether performance of the contract has been rendered impossible or impracticable.

In the present case, I instruct you that you will find that BSO cancelled the arrangements for Vanessa Redgrave's appearance

in performances of Oedipus Rex because of "a cause or causes beyond the reasonable control" of the BSO if you find that the degree of disapproval and protest at a time after the making of the contract and before the BSO cancelled, was so much greater than the BSO expected, or should have expected in the exercise of reasonable care when making the contract, that an ordinarily prudent person, in the position of the BSO at the time it made the contract, would not have regarded that kind of reaction as one of the foreseeable risks. By "foreseeable risks" we mean those risks that a reasonable person (knowing what the BSO's agents knew or should have known in the exercise of reasonable care at the time of making the contract) would take into account as substantial and material factors bearing on the choice as to whether or not to enter into the contract.

In addition, when considering "circumstances beyond the reasonable control" of the BSO, you may also consider whether the general doctrine of frustration applies to this situation. The doctrine of frustration excuses parties from performing a contract where the objectives of the contract are utterly defeated or frustrated by **[1210]** circumstances arising after the contract was made.

In determining whether the BSO's cancellation was justified under this doctrine, you should consider the mutually shared objectives of the parties at the time of the formation of the contract, as manifested by the parties' statements, express or implied. Then, you should determine whether those mutually shared objectives were substantially frustrated by a subsequent event. The mutually shared objectives of the contract should be viewed in broad terms. The frustration must be severe for this doctrine to apply; that is, the principal purpose of the contract between the BSO and Vanessa Redgrave must be utterly defeated because of an event or events which occurred subsequent to the making of that contract. Also, in order for this defense to be supported, you must find that the frustration of the contract resulted without fault on the part of the BSO. You may consider whether the frustrating event or events were foreseeable at the time the contract was made and whether or not the BSO did or, in the exercise of reasonable care, should have foreseen and taken into account the risk of their occurrence. If

you find that such events were reasonably foreseeable by the BSO and that the BSO took the possibility of such events occurring into account at the time that it made its contract with Vanessa Redgrave, or that if acting reasonably it should have done so, then the doctrine of frustration of purpose will not apply.

If, in accordance with these instructions, you find by a preponderance of the evidence that some event or events frustrated the objectives of the contract, or if you find on some other basis that BSO cancelled because of "a cause or causes beyond its reasonable control," you will answer Question 3 YES. Otherwise, you will answer Question 3 NO.

If BSO's cancellation of the arrangements for Vanessa Redgrave to appear in performances of Oedipus Rex is not determined to be legally excused, then the BSO will be liable at least for the performance fee. If you answer YES to Question 1 or YES to both parts of Question 2, or if you answer Question 3 NO, I will enter judgment for the plaintiff against BSO in the amount of $27,500, which the parties have stipulated to be the amount of the performance fee less expenses not incurred. For this reason I have instructed you not to include the performance fee in any of your findings regarding damages.

If you do not find that the cancellation was due to circumstances beyond the BSO's reasonable control, you must also answer additional questions on the verdict form.

Consequential Harm Within the Contemplation of the Parties

[Read Question 4A]

By consequential harm to her professional career I mean harm in the sense of loss of opportunities to appear in other professional performances she claims that she suffered as a consequence of the cancellation of the performances with the BSO.

You will note that Question 4A and the instructions I have already given use the term "cause."

For harm to be caused by the cancellation, as the term "cause" is used throughout these instructions, the cancellation of the performances must have played a part in bringing about the harm. There may, of course, be more than one cause for

any harm or event. Thus, the word "caused" in these instructions means "was a cause."

The term "cause" as used in all these questions and throughout my instructions means "a legally responsible cause" or, as it is often called, "a proximate cause." "Consequence" as used in all the questions and throughout my instructions means something that "a legally responsible cause" plays a part in producing.

Proximate cause is a technical legal term, the meaning of which I will now explain. You cannot extract that meaning from the phrase proximate cause itself. So you will need to pay close attention to my explanation.

Keep two ideas in mind.

[1211] First, if the harm would have happened anyway for other reasons regardless of the cancellation, then the cancellation is not a proximate cause of that harm. This idea is more often expressed as a "but-for" rule rather than a "would-have-happened-anyway" rule. But these are just two different ways of explaining the same idea. Lawyers and judges seem to prefer the double negative form—that is, the way of speaking that says: to find the cancellation a proximate cause of harm you must find that the harm would not have occurred but for the cancellation. Another way of expressing the point is to say, if the harm would have happened anyway—regardless of the BSO's cancellation—then the cancellation was not a proximate cause of that harm.

For example, if you find that after the BSO's cancellation a third person made an independent assessment of Vanessa Redgrave's suitability for employment and decided against employing her because of concern about her public expression of political views, that third person's failure to employ her was not caused by the BSO's cancellation. On the other hand, if you find, for example, that a third person learned about BSO's cancellation, was influenced by it, and made a decision against employing her that he would not have made if he had never heard about the BSO cancellation, and you also find the element of foreseeability (which I will explain in a moment) satisfied, you may find that BSO's cancellation was a legally responsible cause of that loss of employment. Evidence of the

conduct and decisionmaking of third persons, like evidence on any other fact in dispute, may be either direct evidence or circumstantial evidence. If you find that the evidence is insufficient for you to make a finding without speculating or guessing, then the plaintiffs have not met their burden of proof on the causation issue. But you are not limited to findings based on evidence of specific decisions not to employ the plaintiffs. It is for you to determine whether the direct and circumstantial evidence is sufficient to support a finding, based on evidence, that third persons who otherwise would have employed Vanessa Redgrave in the period after BSO's cancellation decided against doing so because they were influenced by BSO's cancellation. Thus, in summary, you may award damages for any lost work only if you find that BSO's cancellation was a substantial factor in a third person's decision not to employ Vanessa Redgrave and the third person would not have made the same decision but for BSO's cancellation.

Second, either the harm must have been a direct result of the cancellation (without any intervening force or the decision of any other person coming to bear) or the harm must have been foreseeable in a general sense—not precisely the way it happened, but a harm of that general type or kind must be reasonably foreseeable. Plaintiffs' claim that BSO's cancellation caused harm by influencing the decisions of others. Thus, to show that the BSO's cancellation proximately caused loss of other professional opportunities, in this way, plaintiff must show that it was foreseeable that BSO's cancellation would affect the decision of others. The idea of foreseeability is also expressed by the phrase "natural and probable consequence."

Now, putting these two ideas together in one definition of proximate cause, I instruct you as follows:

You will find that BSO's cancellation was a proximate cause of harm to Vanessa Redgrave's professional career if you find, from a preponderance of the evidence in the case, that the harm would not have occurred but for the cancellation and that the harm was a natural and probable consequence of the cancellation.

The plaintiffs have the burden of proving by a preponderance of the evidence the claimed causal relationship between the

BSO's cancellation and the plaintiff's claimed harm. You are not allowed to speculate on the question of causal relationship.

If you find that plaintiffs have met this burden, you will answer Question 4A YES. **[1212]** Otherwise, you will answer Question 4A NO.

[If you have answered 4A YES, read 4B]

Damages are allowed for consequential harm to her professional career only if the harm was a foreseeable consequence within the contemplation of the parties to the contract when it was made.

By the phrase "harm that is a foreseeable consequence within the contemplation of the parties" we mean harm of a kind within one or more of the following groups: (1) harm of a kind that was referred to in communications between the parties while they were negotiating at or before the time the contract was made; (2) any other harm of a kind foreseeable as sufficiently likely to result from cancellation that it would have been taken into account in the exercise of reasonable care in assessing the possible costs and benefits of the proposed contract and in deciding whether or not to enter into the contract. The test of foreseeable harm is an objective one based on what a party to the contract, at the time of making the contract, knew or had reason to foresee or had reason to know or ought to have known would be harm which could result from the breach of the contract. To be within the contemplation of the parties, the harm must be of a kind that either was foreseen or else was foreseeable by a reasonable person in the position of the party now being sued, taking into account the facts and circumstances that party or its agents knew, as well other facts and circumstances, if any, which a reasonable person in that position would have known through the exercise of reasonable care. Thus, in order to find that consequential harm was within the contemplation of both parties in this case, you must find that BSO's agents knew or should have known, when the contract was made, that there was a substantial likelihood that a cancellation would be likely to cause Vanessa Redgrave to lose other professional work.

The plaintiffs have the burden of proving by a preponderance of the evidence that the harm was a foreseeable consequence

within the contemplation of the parties. You are not allowed to speculate on this question.

If you find that plaintiffs have met this burden, you will answer Question 4B YES. Otherwise, you will answer Question 4B NO.

[Read Question 5]

Plaintiffs contend in this case that BSO's cancellation was a cause of harm to Vanessa Redgrave's professional career in two ways. First, plaintiffs say that since BSO was a prestigious cultural organization, the very fact that it decided to cancel rather than proceed with performances in which Vanessa Redgrave was to appear would tend to influence others not to offer her future professional opportunities.

Second, plaintiffs contend that BSO's cancellation and press release impliedly stated to others that BSO's managerial agents held the opinion that Vanessa Redgrave, because of her publicly expressed political views, was so controversial that the risks associated with the series of performances in Boston and New York, in which she was to appear as narrator, were too great to be acceptable to a prudently managed symphony orchestra. Plaintiffs contend that this alleged implied statement of opinion influenced others not to offer her opportunities they otherwise would have offered. Question 11 concerns this contention particularly, and I will be giving you more instructions in connection with that question. Bear those instructions in mind also as you consider Question 5.

In answering Question 5, it will be for you to determine whether the evidence supports either, both, or neither of these contentions.

If you have found that the required relationship exists between Vanessa Redgrave's harm and the BSO's cancellation, by answering YES to both Questions 4A and 4B you may award reasonable and fair damages. The purpose for awarding an amount of damages is to put a plaintiff in as good a position as the plaintiff would have been in had it not been for the defendant's wrongful conduct.

[1213] The fact that the precise amount of damages may be difficult to ascertain does not defeat a right to recovery. How-

ever, any damages awarded must be based upon evidence you have heard. An award must not be speculative.

If you find wrongful conduct and find that it caused harm, then you may also consider whether that conduct not only caused harm but also caused uncertainty about the precise amount of that harm. If you so find you may take that into account in determining whether you can find a particular dollar amount of harm proved by a preponderance of the evidence. Another way of expressing this idea is to say that in determining whether the direct and circumstantial evidence supports a finding in some amount you may consider the extent to which availability of evidence was affected by the wrongful conduct.

Also, on the other hand, if a plaintiff's own conduct, either before or after the defendant's action, produced circumstances that caused or contributed to uncertainty about the precise amount of any harm of which the defendant's conduct was a cause, you may take that fact into account. A plaintiff is not in any sense relieved of the burden of proof merely because of difficulties of proof arising from uncertainties to which plaintiff's own conduct has contributed.

If you find that Vanessa Redgrave's public expression of political views had had an effect, before the BSO cancellation, of reducing the professional opportunities she otherwise would have had and that her public expression, either before or after the cancellation, continued to have such an effect after the cancellation, plaintiffs are not entitled to damages for any loss of professional opportunities after the cancellation that would have occurred anyway, because of the effect of her public expression of political views, even if the BSO had not cancelled. If, however, her professional opportunities would have been reduced to some extent by reason of her public expression of political views and they were reduced still further by the influence of the BSO cancellation, plaintiffs are entitled to compensation for this additional harm (the difference between what her opportunities would have been if the cancellation had not occurred, and what they were as a result of the combined effect of her public expressions and the cancellation) if you find that such a difference and its amount have been proved by a preponderance of the evidence.

Now I turn to what in law is referred to as mitigation of damages.

The law requires that anyone who claims damages as a result of the conduct of another must exercise reasonable care to take advantage of any reasonable opportunity to mitigate—that is to reduce or limit—the resulting harm.

If you find that after the BSO cancellation Vanessa Redgrave rejected employment opportunities to pursue interests apart from professional opportunities or acted unreasonably in not accepting professional opportunities available to her you may reduce your finding of consequential damages to a sum that would be fair and reasonable compensation for the more limited harm she would have suffered had she acted reasonably to mitigate damages.

In summary, in determining the amount of damages you award, if any, you must consider all the evidence presented in the case bearing on that subject. You must decide, from a preponderance of evidence, the amount, if any, of money paid now in cash, that is required to compensate plaintiffs fairly and reasonably for any harm that you find was suffered by plaintiffs as a consequence of the BSO's cancellation. Plaintiffs have the burden of proving by a preponderance of the evidence the amount of damages. You must not include in or add to an otherwise just award any sum that is speculative rather than being supported by a preponderance of the evidence. Also, you must not include any sum for the purpose of punishing the BSO for its decision.

Massachusetts Law on Violation of Civil Rights

Plaintiffs in this case, in addition to their claims for breach of contract, as to which I **[1214]** have now given you full instructions, have also made a claim based on alleged violation of a Massachusetts statute that provides legal remedies in defined circumstances for violations of civil rights. This statute went into effect on February 14, 1980, and up to this time the Supreme Judicial Court of Massachusetts, whose decisions I must follow as precedents in applying Massachusetts law, has

had no occasion to interpret that statute in relation to claims such as are made in this case.

After conferring with the attorneys in this case, I have concluded I will need your answers not only to Questions 1 and 2 but as well to additional questions on the verdict form, to enable me to determine what judgment to enter on the claims of violation of the Massachusetts statute on civil rights. However, if you answer NO to Question 1 *and* NO to either part of Question 2, you will not answer any other question concerning the civil rights claims in this case.

[Read Question 6]

Civil Rights Act—Liability

With regard to the Massachusetts Civil Rights Act, Vanessa Redgrave contends that the BSO cancelled the arrangements for her to appear in Oedipus Rex because of the opposition of one or more of the BSO's agents or trustees to her political views and their desire to retaliate against her for those views and to coerce and intimidate her into becoming less outspoken. The BSO contends that it cancelled the arrangements because of concern about disruption and the effect of her appearance on the artistic integrity of the performances, and concern about safety and security.

In order to prove that the BSO interfered or attempted to interfere with Vanessa Redgrave's civil rights under Massachusetts Civil Rights Act, the plaintiff, Vanessa Redgrave, must show by a preponderance of the evidence that the BSO, through its agents, threatened, intimidated, or coerced her for the purpose of interfering with, or attempting to interfere with her civil right to free expression of her political views and that such conduct by the BSO was a proximate cause of harm suffered by her.

I instruct you that as applied to this case a "threat" means a communicated intent to cause physical or other harm, which may include mental or emotional harm, to person or property or contractual rights, with the purpose of causing the person to whom the threat is made to give up some right or thing or to act in the way the person making the threat directs.

"Intimidation" means putting another person in fear for a like purpose.

"Coercion" means use of threat, intimidation, force, compulsion, or duress for a like purpose. Coercion may include depriving a person of a contractual right to work in retaliation for the person's political views with the purpose of causing that person to alter those views or to become less outspoken.

If you find that the BSO, through its agents, threatened, intimidated, or coerced Vanessa Redgrave, you must then consider whether the BSO, or its agents, intended through such threats, intimidation, or coercion to interfere with her right to free expression of her political views. In considering whether the BSO or its agents intended to interfere with Vanessa Redgrave's right to free expression of her political views, I instruct you that BSO, as a corporation, can act only through its agents. The law holds BSO responsible for the acts of its agents if, but only if, those acts were within the scope of the authority of the agents. If you find that a particular agent engaged in threats, intimidation, or coercion and when doing so was acting in his or her ordinary course of duties with the BSO and intended to interfere with Ms. Redgrave's right to free expression of her political views, then you may find that the BSO so intended.

If you find that plaintiff has proved by a preponderance of the evidence that BSO used threat, intimidation, or coercion for the purpose stated in Question 6 and that it was a proximate cause of harm suffered by **[1215]** Vanessa Redgrave, you will answer YES. Otherwise, answer No.

[Read Question 7]

As to Question 7, I remind you of my previous instructions on threat, intimidation, and coercion. If you find that plaintiff has proved by a preponderance of the evidence that one or more of the BSO trustees opposed Vanessa Redgrave's political views and wanted to retaliate against and punish her for those views and to coerce and intimidate her into becoming less outspoken in her views, and if you find also that BSO would not have cancelled but for the trustee or trustees' position, you will answer YES. Otherwise, answer No.

[Read Question 8]

If you answered YES to Question 6 or YES to Question 7, then you must determine the amount of damages, if any, which should be awarded to the plaintiff.

In order to recover any damages for violation of the Massachusetts Civil Rights Act, the plaintiff must prove that she suffered harm or injury because of the BSO's intentional interference or attempted interference with her civil rights. In determining the amount, if any, of damages to be awarded under this Act, you may consider the "chilling effect," if any, of the BSO's actions on Vanessa Redgrave's exercise of her civil right of free expression of political views, the deprivation or "chilling," if any, of her right to associate artistically with fellow artists, and the damage, if any, to her professional career caused by that violation of her civil right. You may also consider any mental or emotional harm which the plaintiff has claimed that she suffered as a result of any threats, intimidation, or coercion by which the BSO interfered with or attempted to interfere with Vanessa Redgrave's civil rights, if you find that such an interference or attempt occurred.

However, you may not speculate on the amount of damages which she is entitled to recover for this injury. The plaintiff has the burden of proving that she suffered harm or injury by a preponderance of the evidence. Only such damages may be awarded as will reasonably and fairly compensate Vanessa Redgrave for injury or harm that you find by a preponderance of the evidence was caused by the BSO's intentional interference or attempted interference with her civil rights. As I instructed you earlier, you may not include in or add to an otherwise just award any sum for the purpose of punishing the BSO or showing that you disagreed with its actions.

I am submitting three additional questions to you in order to make clear whether there is any overlapping of your findings of damages after you have made findings concerning damages in your answers to Question 5 and to Question 8. If you answered with a DOLLAR AMOUNT other than none for *both* Question 5 and Question 8, I will ask you to answer Question 9, which reads as follows:

[Read Question 9]

Question 10 also deals with the possibility of overlapping damages and should be self-explanatory.

[Read Question 10]

If you have answered NONE to Question 5, and NONE to Question 10, skip all remaining questions. Otherwise, answer Question 11.

[Read Question 11A]

I ask Question 11 in order to know the basis for your answers to both Question 5 and Question 10. Therefore, I am asking you to answer Question 11 about whether you find support for what I previously referred to as the second contention of the plaintiffs as to how the BSO's cancellation caused harm to Ms. Redgrave's professional career.

The contention is this: plaintiffs say that BSO's cancellation and press release impliedly stated to others that BSO's managerial agents held the opinion that Vanessa Redgrave was so controversial because of her publicly held political views that the risks associated with the series of performances in Boston and New York, in which she was to appear as narrator, were too great to be acceptable to a prudently **[1216]** managed symphony orchestra. Plaintiffs say further, that BSO held no such opinion, and further that this implied statement of opinion influenced other persons not to offer Vanessa Redgrave opportunities they otherwise would have offered.

In answering Question 11A, you must understand what I mean by statements that are impliedly made. You may find that the BSO, in cancelling the arrangements for Vanessa Redgrave to appear in Oedipus Rex, impliedly said something to the public in addition to saying merely "we have cancelled."

As I have stated, plaintiffs contend in particular that BSO's cancellation and press release impliedly stated to others that BSO's managerial agents held the opinion that Vanessa Redgrave was so controversial because of her publicly expressed political views that the risks associated with the performances in which she was to appear were too great to be acceptable to a prudently managed symphony orchestra. You must determine if the BSO's cancellation and press release impliedly stated that BSO's managerial agents held such an opinion. In considering this question, you should consider both the actions taken by the

BSO in cancelling the arrangements for Vanessa Redgrave to appear and any public statements made by the BSO in cancelling, the arrangements. It is plaintiffs' burden to show by a preponderance of the evidence that the BSO's cancellation and press release impliedly stated that the BSO's managerial agents held the opinion stated in Question 11A. You may not speculate as to whether the BSO's cancellation and press release impliedly stated that the BSO's managerial agents held such an opinion. Your finding must be a finding from a preponderance of the evidence.

If you answer YES to Question 11A, that the BSO's cancellation and press release impliedly made this statement to others, then you must answer Question 11B.

[Read Question 11B]

This question asks you whether or not you find, by a preponderance of the evidence, that the BSO's managerial agents did *not*, in fact, hold the opinion expressed in the statement impliedly made by the cancellation and press release.

[Read Question 11C]

Question 11C asks you to determine what amount of damages, if any, such an implied statement caused if it was made. The law may or may not allow plaintiffs to recover this sum. That is a legal question that I will have to decide before entering judgment.

Except as I have indicated otherwise by instructions to skip questions, based upon answers to previous questions, it is necessary to have your answers to all these questions in order to determine what judgment should be entered.

* * * *

COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ON CIVIL RIGHTS CLAIM DATED FEBRUARY 13, 1985

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 82-3193-K

VANESSA REDGRAVE and VANESSA REDGRAVE ENTERPRISES, LTD.,

Plaintiffs

—v.—

BOSTON SYMPHONY ORCHESTRA, INC.,

Defendant

Findings of Fact and Conclusions of Law
February 13, 1985

The following constitutes the court's findings of fact and conclusions of law, issued pursuant to Fed. R. Civ. P. 52(a), which are dispositive of the claim by plaintiff, Vanessa Redgrave (Redgrave), that defendant, Boston Symphony Orchestra (BSO), violated the Massachusetts Civil Rights Act, Mass. Gen. Laws Ann. ch.12, §§ 11H and 11I (1984), by cancelling performances of Oedipus Rex in which Redgrave was scheduled to appear as narrator.

I.

I find that plaintiff has failed to prove by a preponderance of the evidence that BSO's only reason, or primary reason, for cancelling the arrangements for her to appear in the performances of Oedipus Rex was that agents who acted for BSO in

making the decision to cancel disagreed with political views that plaintiff had publicly expressed. I also find that Redgrave has failed to prove by a preponderance of the evidence that BSO would not have cancelled but for the influence of one or more of its agents, because of their personal disagreement with plaintiff's political views.

These findings are based in part on the testimony of the witnesses Seiji Ozawa, Tom Morris, William Bernell, and Nelson Darling. Ozawa testified that he wanted to cancel the performances because of the potential for disruption, which meant he could not present the performances with the artistic qualities he had intended. Transcript, October 24, 1984, Volume 4, Morning Session, pp. 19-21, 25-26, 91-92. Morris testified that the performances were cancelled because of the fear of disruption and not because of Redgrave's political beliefs. Transcript, October 25, 1984, Volume 5, pp. 7-8, 48, 56. Bernell testified that, as artistic administrator of BSO, he was concerned that going on with the performances could jeopardize the artistic integrity of the production and the physical safety of the performers and audience. Transcript, November 2, 1984, Volume 11, pp. 65-68. Darling testified that, as president of BSO, he agreed with the conclusions of Ozawa and Morris that the performances be cancelled after hearing their concerns about potential disruption and artistic integrity. Transcript, November 5, 1984, Volume 12, Afternoon Session, pp. 79-82. I credit and give substantial weight to the above testimony.

No direct evidence contrary to this testimony was by plaintiff. Rather, plaintiff relies upon circumstantial evidence and inferences. Of course, in some instances circumstantial evidence of motivation and intent may be more powerful than the direct testimony of the actors whose states of mind are at issue. In this instance, however, I find that the circumstantial evidence of intent contrary to the testimony of these witnesses is outweighed by the credibility of their testimony.

The Massachusetts Civil Rights Act provides for a private right of action against "any person or persons, whether or not acting under the color of law, [who] interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other

person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth." Mass. Gen. Laws Ann. ch.12, §§ 11H and 11I (1984). Those liable under the statute must thus employ "threats, intimidation or coercion" when interfering or attempting to interfere with the protected rights of another. In this context, a "threat" means a communicated intent to cause physical or other harm, which may include mental or emotional harm, to person or property or contractual rights, with the purpose of causing the person to whom the threat is made to give up some right or thing or to act in the way the person making the threat directs. "Intimidation" means putting another person in fear for a like purpose. "Coercion" means use of threat, intimidation, force, compulsion, or duress for a like purpose. Coercion may include depriving a person of a contractual right to work in retaliation for the person's political views with the purpose of causing that person to alter those views or to become less outspoken.

I find, based on my previous findings and the testimony discussed above, which I credit, that Redgrave has failed to prove by a preponderance of the evidence that BSO or its agents interfered or attempted to interfere, by threats, intimidation, or coercion, with her civil right to free expression of her political views. I find that Redgrave has failed to prove that any "threats, intimidation or coercion," as defined above, in fact occurred. The above definitions are the same as those given in instructions to the jury, to which plaintiff did not at that time object.

The above findings of fact are inconsistent with plaintiff's proposed findings on the civil rights claim. I reject those proposed findings as unsupported by the weight of the evidence.

II.

Redgrave argues that even if BSO's decision to cancel was not made to express disapproval of her public expression of her political views, BSO should be held liable under the Massachusetts Civil Rights Act because BSO did at least cancel because of

acquiescence in expressions of disapproval voiced by BSO subscribers and other members of the community. I concluded at trial, and adhere to the view now, that such acquiescence is not a violation of the Massachusetts Civil Rights Act. Even if it in fact occurred, such acquiescence, unaccompanied by conduct such as that described in section I above—conduct which I have found Redgrave has failed to prove by a preponderance of the evidence—does not amount to "threats, intimidation or coercion," an essential element of any claim under the statute.

III.

In light of the above findings and conclusions, Redgrave has failed to prove that BSO violated the Massachusetts Civil Rights Act by cancelling the arrangements for her to appear as narrator in performances of Oedipus Rex. BSO is entitled to judgment on the state civil rights claim.

ROBERT E. KEETON
United States District Judge

Supreme Court, U.S.
FILED
DEC 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-912

In the

Supreme Court of the United States

OCTOBER TERM, 1988

VANESSA REDGRAVE,
PETITIONER,

v.

BOSTON SYMPHONY ORCHESTRA, INC.,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief in Opposition to Petition for Writ of Certiorari

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27pp

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the First Circuit Court of Appeals, sitting in diversity, properly relied on two state statutory grounds and a state constitutional ground in affirming judgment against petitioner's civil claim under a Massachusetts statute, Mass. Gen. L. ch. 12, §§ 11H - 11I (1986).

RULE 28.1 LISTING

Respondent Boston Symphony Orchestra, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Sup. Ct. R. 28.1.

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Brief In Opposition To Petition For Writ Of Certiorari

The respondent, Boston Symphony Orchestra, Inc. (BSO), respectfully requests that this Court deny the petition for writ of certiorari seeking review of the First Circuit Court of Appeals' opinion in this case. In that opinion, reported at 855 F.2d 888 (1st Cir. 1988) (*en banc*) (Coffin, J.) and set forth at pages 1a-67a of petitioner's appendix, the Court of Appeals held, "in light of [its] understanding of state law, that the

district court correctly entered judgment for the BSO" on the state statutory claim petitioner seeks to pursue before this Court. *Id.* at 912, Pet. A. 43a.[1]

COUNTERSTATEMENT OF THE CASE

Petitioner Redgrave, an actress, sued the BSO for cancelling a series of concerts that she had been hired to narrate in Boston and New York. Soon after petitioner's engagement the BSO began receiving dozens of angry and abusive calls protesting petitioner's support of the Palestine Liberation Organization. One caller stated that there would be "bloodshed and violence" at Boston's Symphony Hall if Redgrave appeared. C.A. App. 1386a, 1600a. Other callers threatened "trouble," and some stated that Redgrave's engagement would "haunt" the Symphony, that she "should perish," and that the Symphony would "mourn." C.A. App. 1383a-1390a, 1674a. The people receiving these calls were "scared" and "shaken." C.A. App. 1599a-1601a, 1659a, 1673a.

BSO decision makers consulted with police authorities and other people knowledgeable about the threatened disruptions. They were told that Redgrave's appearance at New York's Carnegie Hall might cause a riot, C.A. App. 593a-596a, that security measures at Carnegie Hall had not prevented disruptions in the past, C.A. App. 611a-613a, and that no amount of security precautions could prevent the acts expected to disrupt the concerts at Boston's Symphony Hall. C.A. App. 1739a-1747a. Redgrave's own agent cautioned her that "some-

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[1] References to "Pet. A __" are to the appendix to the petition for certiorari. References to "C.A. App. __" are to the joint appendix filed with the Court of Appeals.

thing might happen to her." C.A. App. 1874a. The BSO decided to cancel the concert series and offered all the guest artists, including petitioner, their full performance fees. C.A. App. 1515a-1517a.

Petitioner refused her fee and sued in federal court under several state and federal theories, most of which were dismissed as meritless before trial. C.A. App. 2a. Remaining for trial were two state law claims, with jurisdiction resting on diversity of citizenship. 28 U.S.C. § 1332(a) (1982). Petitioner and another[2] sued for breach of contract, and petitioner alone sued under a state statute known as the Massachusetts Civil Rights Act (MCRA), Mass. Gen. L. ch. 12, §§ 11H - 11I (1986).

Redgrave's MCRA claim — the subject of this petition — was that the BSO was liable under the Massachusetts statute for allegedly interfering, "by threats, intimidation or coercion," with her exercise of free speech rights. The MCRA creates a private cause of action for "[a]ny person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with . . . ." Mass. Gen. L. ch. 12, § 11I. A person may be liable for interference "by threats, intimidation or coercion" with such rights, "whether or not acting under color of law." *Id.* § 11H. The state statute thus "extend[s] beyond the limits of its Federal counterpart," 42 U.S.C. § 1983, "by incorporating private action within its bounds." *Batchelder* v. *Allied Stores Corp.*, 393 Mass. 819, 822, 473 N.E.2d 1128, 1131 (1985).

The district court (Keeton, J.) and a jury sitting in an advisory capacity both concluded that the BSO did not cancel the concerts because of any disagreement with petitioner's political views. Rather, the district court specifically found that the BSO decision makers cancelled the concerts because they were

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[2] Vanessa Redgrave Enterprises, Ltd.

concerned about potential disruptions that could jeopardize the artistic integrity of the performance and the physical safety of the performers and audience. Pet. A. 182a.[3] The district court concluded that the BSO could not in such circumstances be held liable under the MCRA, and accordingly entered judgment for the BSO.

Petitioner appealed, arguing that the district court should have read the MCRA to impose liability on the BSO, even though it cancelled the concerts for reasons of physical safety and artistic integrity, because the cancellations ultimately resulted from protests over petitioner's political views. The First Circuit heard argument, and then on its own motion certified two questions on the MCRA to the Massachusetts Supreme Judicial Court (SJC). Pet. A. 93a-94a.[4]

The Supreme Judicial Court answered the specific questions certified, and also provided explicit advice on "serious issues which are not addressed in the questions but which are suggested by the record of the case." *Redgrave* v. *Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 97, 502 N.E.2d 1375, 1377 (1987), Pet. A. 112a (plurality opinion). After hearing argument from the parties and considering numerous *amicus* submissions,[5] the SJC pointed out state law limits to the MCRA resulting from this case's unusual fact situation:

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[3] Petitioner has never challenged the sufficiency of the evidence supporting these findings, notwithstanding her efforts to recast the trial record before this Court. Petition at 5-9.

[4] First, the Court of Appeals asked whether a defendant could be held liable under the MCRA "if the defendant had no personal desire to interfere with the rights of that person but acquiesced to pressure from third parties." Pet. A. 93a. Second, the Court of Appeals asked if it would be a defense under the MCRA "for the defendant to show that its actions were independently motivated by additional concerns," such as economic loss or physical safety. Pet. A. 94a.

[5] The Attorney General of Massachusetts, the American Jewish Congress, the Lawyers' Committee for Civil Rights Under Law of the Boston Bar Association and the Civil Liberties Union of Massachusetts submitted *amicus* briefs to the SJC.

the BSO was *itself* engaged in speech protected by the MCRA, and "was itself a victim of violations of [the MCRA] by those persons who put pressure on the BSO to cancel" its own concert series. *Id.*

The SJC justices, while writing three separate opinions on the narrow questions certified, all agreed that the atypical nature of this case could protect the BSO from MCRA liability. The justices forming the plurality on the certified questions acknowledged that, as a matter of statutory construction, "it can be argued . . . that it was not within the legislative intent" to punish a defendant under the MCRA simply for deciding "not to speak (i.e., perform)." 399 Mass. at 97, 502 N.E.2d at 1377, Pet. A. 112a-113a. The dissent similarly doubted that "[m]ere cancellation of the performances" could subject the BSO to liability under the statute. *Id.* at 110, 502 N.E.2d at 1385, Pet. A. 126a. The concurrence added that it was "unable to think of any theory under which . . . statutory liability may properly be imposed on the BSO in the face of its State constitutional right to determine what artistic performances it will or will not perform." *Id.* at 102, 502 N.E.2d at 1380, Pet. A. 118a. Having thus explicated the MCRA's reach in this *atypical* case, the SJC answered the certified questions "as they [were] worded," namely "as addressed to a *typical* [MCRA] action" that did *not* involve a defendant itself engaged in speech. *Id.* at 97, 502 N.E.2d at 1377, Pet. A. 113a (emphasis added).[6]

A divided panel of the First Circuit held in favor of petitioner. Pet. A. 72a-108a. The First Circuit *en banc* vacated that decision, and affirmed the district court's judgment on the MCRA claim, based on the SJC's opinions as to the reach of that state statute. Petitioner then moved without success to certify additional state law questions to the SJC. Pet. A. 70a-71a.

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[6] The "typical" MCRA action seeks to redress racial violence by private parties. It was "'serious problem[s] of racial harassment'" that prompted passage of the Act. *Batchelder*, 393 Mass. at 821, 473 N.E.2d at 1130 (citation omitted).

REASONS FOR DENYING THE WRIT

The Supreme Court should not grant certiorari to reconsider the First Circuit's reading of Massachusetts law, a reading even petitioner has called "reasonable." Petitioner would have this Court reverse the Court of Appeals on each of three state law grounds for decision, in order to decide a federal constitutional defense that the First Circuit *en banc* did not reach. Petitioner has not explained why this Court, contrary to its usual practice, should grant certiorari to venture opinions on state statutory and state constitutional issues that Massachusetts courts could repudiate tomorrow. Moreover, petitioner asks this Court to reach the undecided federal constitutional issue without any showing that it has arisen before or since in Massachusetts. Nor has petitioner shown that this federal issue could possibly arise under the statutes of any other state. Supreme Court review of such a case is inappropriate.

I. PETITIONER PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

A. The Holding Below Rested On Three State Law Grounds.

Petitioner seeks to manufacture for review a federal "holding" that does not exist. Petitioner asks this Court to review "[t]he 'holding' below, that there is an 'artistic integrity' constitutional defense to MCRA liability." Petition at 27. The Court of Appeals, however, "*decline[d] to reach the federal constitutional issues.*" 855 F.2d at 911, Pet. A. 43a (emphasis added). Instead, the Court of Appeals held for the BSO based on *state law*: "we hold, in light of our understanding of *state law*, that the district court correctly entered judgment for the

BSO on Redgrave's MCRA claim." *Id.* at 912, Pet. A. 43a (emphasis added). This holding rested explicitly on two state statutory grounds and on the state constitution.

Petitioner simply disregards the First Circuit's conclusion that the state statute on which her claim rests "does not in the first instance impose liability for refusing to perform." 855 F.2d at 909, Pet. A. 38a. First, the Court of Appeals noted the SJC plurality's suggestion of the observation that " 'it was *not within the legislative intent* that anyone should be punished under [the MCRA] for exercising the constitutional right not to speak (i.e., perform).' " *Id.* at 907, Pet. A. 34a (quoting 399 Mass. at 97, 502 N.E.2d at 1377) (emphasis added). The Court of Appeals noted that the SJC dissent raised much the same point, indicating that the BSO would not be liable under the MCRA if it "intended 'only to exercise its constitutional right not to present an inartistic performance.' " *Id.* at 909, Pet. A. 38a (quoting 399 Mass. at 103, 502 N.E.2d at 1381). "We have no reason to think," the First Circuit concluded, "that the Massachusetts Legislature enacted the MCRA in an attempt to have its courts, at the insistence of private plaintiffs, oversee the editorial judgments of newspapers, the speech-related activities of private universities, or the aesthetic judgments of artists." *Id.* at 906, Pet. A. 33a. Petitioner offers no reason why this Court should think otherwise.

The Court of Appeals also relied on a second state statutory ground for its decision. The Court found no indication that any SJC justice would dispute Justice O'Connor's observation, made as an aside to his dissent on the certified questions, that the " '[m]ere cancellation' " of concerts " 'would not appear to convey the message that the BSO intended to take any future action' " against petitioner. 855 F.2d at 908, Pet. A. 37a (quoting 399 Mass. at 110, 502 N.E.2d at 1385). The First Circuit, like Justice O'Connor, therefore could not find the interference

" 'by threats, intimidation or coercion' " with petitioner's rights required for MCRA liability. *Id.* The First Circuit concluded that the SJC would follow this reasoning and "interpret the statute so as to find that cancellation of a performance could not be the basis for MCRA liability." 855 F.2d at 909, Pet. A. 39a.

The Court of Appeals was "equally confident that a majority, if not all, of the [SJC] justices, would agree with the concurrence that a *state constitutional defense also bars liability*." 855 F.2d at 910, Pet. A. 40a (emphasis added). As the Court of Appeals observed, the SJC's plurality opinion acknowledged constitutional doubts, and the concurrence addressed explicitly the BSO's "constitutional right to free speech under art. 16 of the Massachusetts Declaration of Rights." 399 Mass. at 102, 502 N.E.2d at 1380, Pet. A. 117a (Wilkins, J., concurring). The concurrence stated it was "unable to think of any theory under which . . . statutory liability may properly be imposed on the BSO in the face of its *State* constitutional right to determine what artistic performances it will or will not perform." *Id.*, Pet. A. 118a (emphasis added). The First Circuit, having thus found that petitioner had no state law claim to begin with, concluded it was "unnecessary and improper" to reach the BSO's federal constitutional defense. 855 F.2d at 909, Pet. A. 38a.

B. The Court Below Properly Considered State Court Responses to Certified Questions in Construing State Law.

Petitioner fails to convert the First Circuit's reading of state law into anything more than a garden-variety diversity decision by suggesting that the Court of Appeals "violated" *Michigan* v. *Long*, 463 U.S. 1032 (1983). This Court formulated the *Long* doctrine — requiring a "plain statement" of a state law

basis for decision to preclude review of a federal question — for direct review of state court decisions. Petitioner can cite no decision that reads *Long* to require federal courts interpreting state law sources in diversity to pass over possible state grounds for decision. Nor is there any reason it should.

The doctrine that governs federal court interpretation of state law is the *Erie*[7] doctrine, not the *Long* doctrine. The *Erie* line of cases, which petitioner tellingly ignores, long ago established that federal courts have the power — indeed, the *duty* — "in every case to ascertain from *all* the available data what the state law is . . . ." *West* v. *American Telephone and Telegraph Co.*, 311 U.S. 223, 237 (1940) (emphasis added). *All* the available data includes the SJC's "mere dicta," on which, petitioner complains, the Court of Appeals relied. Petition at 21. *Cf. Nolan* v. *Transocean Air Lines*, 365 U.S. 293, 295-96 (1961) (per curiam) (remanding for consideration of state supreme court opinion's "considered dictum" on issue). The contrary rule petitioner suggests would require a federal court to ignore advice on state law sought from — and given by — the state's highest court.

Here the First Circuit considered "all the available data," as required by the *Erie* doctrine, and indeed went further. On its own motion it certified questions of state law to the SJC and then carefully considered the responses. That the First Circuit could in its "sound discretion" certify certain issues to the state court, *Lehman Bros.* v. *Schein*, 416 U.S. 386, 390-91 (1974), does not give petitioner the right to insist that the federal court must then somehow extract from the state court definitive answers to every applicable state law question.[8]

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[7] *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938).

[8] Petitioner complains that the First Circuit went beyond the "yes" or "no" answers to the certified questions and considered all the comments that the SJC offered, both on the state constitution and on the scope of the MCRA. *E.g.*, Petition at 22 n.18. But that was exactly what the SJC intended. The SJC

Petitioner, after all, was the party who chose to bring her state law claims in federal rather than state court. *Cf. Colonial Park Country Club* v. *Joan of Arc*, 746 F.2d 1425, 1429 (10th Cir. 1984) (appellant "chose to file its case in federal court, and hence is in a somewhat awkward position to now claim that the federal judge misunderstood [state] law").

The *Long* doctrine, which petitioner seeks to apply here, rests on the fact that in cases of direct review state courts have entire cases squarely before them. In such cases the state courts can protect and develop state jurisprudence merely by stating plainly whether they are deciding state or federal law. *Long*, 463 U.S. at 1041. In diversity cases, on the other hand, state courts do not have the cases before them; rather, federal courts are predicting what the state courts *would* do. This is by definition a less exact exercise: "As long as there is diversity jurisdiction, 'estimates' are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law." *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring).

Petitioner argues in essence that the Court of Appeals must proceed to respondent's federal constitutional defense unless there is a state court decision directly on point against her on a state issue. *See* Petition at 17-24. This proposition collides with the *Erie* doctrine. Surely a federal court does not err by construing a state statute simply because there is no state court decision on point.[9] Otherwise a federal court would not be

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views certification as a "cooperative decision making process" in which, "even if not asked, [it] might volunteer unsolicited comments on State law which could be largely dispositive of the matter before the . . . Court." *Baird* v. *Attorney General*, 371 Mass. 741, 765, 360 N.E.2d 288, 302 (1977).

[9] *Cf. MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281 (1942) (per curiam) (affirmance of lower federal court's reading of state law

acting as "'only another court of the State,'" *Angel* v. *Bullington*, 330 U.S. 183, 187 (1947) (citation omitted), but would be playing by different rules.

Petitioner's argument for passing over possible state law grounds also conflicts with the Court's "settled policy [of] avoid[ing] unnecessary decisions of constitutional issues." *Mills* v. *Rogers*, 457 U.S. 291, 305 (1982). Thus in *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), this Court remanded specifically so that the Court of Appeals could decide whether the state constitution disposed of the controversy in order to avoid the federal constitutional issue. 455 U.S. at 293-95. The Court's concern in that case — "that we may be unnecessarily reaching out to decide a novel constitutional question," *id.* at 295 — is equally applicable here.

The SJC's opinion serves in any event to satisfy the general interpretive principles set forth in *Long*. *Long* requires a clear statement of an independent and adequate state ground where "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law." *Long*, 463 U.S.at 1040. Here the SJC's opinion addressed state statutory grounds that could hardly be confused with the federal constitution. Reliance on the state constitution was also explicit. The SJC concurrence refers by name to Article 16 of the Massachusetts Declaration of Rights. 399 Mass. at 102, 502 N.E.2d at 1380, Pet. A. 117a (Wilkins, J., concurring). Indeed, the SJC was necessarily discussing the state constitution, since in answering certified questions it has explicitly limited its role "to answering certified 'questions of [the] law of this State.'" *Cabot Corp.* v. *Baddour*, 394 Mass. 720, 721, 477 N.E.2d 399, 400 (1985) (SJC declined to consider question of federal

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where no decision construing the relevant state law "has been brought to our attention").

law, quoting S.J.C. Rule 1:03 on certification).[10] As even the dissent below conceded, "had this exact case arisen in the Massachusetts state courts and proceeded in its present form to the SJC, the BSO would not have been subjected to liability" under state law. 855 F.2d at 914, Pet. A. 47a (Bownes, J., dissenting).

C. Even The Federal Issue Not Reached Below Would Be Inappropriate For Review.

Petitioner could pose no federal constitutional issue worthy of further review even if she could persuade this Court to second-guess the First Circuit's reading of state law. Petitioner would have this Court decide whether the First Amendment furnishes the BSO with a defense to petitioner's MCRA claim. This issue was not reached below, and it is inappropriate for the issue to be decided for the first time by this Court.

Petitioner also makes no showing that the issue could ever arise again. She cites no other case in which the same issue has arisen, nor has she pointed to any other state statute that even arguably could pose the same constitutional issue. To the contrary, petitioner herself speaks of the MCRA's "peculiar genius," Petition at 4, peculiar in that it allows a "free speech"

[10] Petitioner is wrong to suggest that the SJC simply interprets Article 16 as coextensive with the federal constitutions's First Amendment. *E.g.*, Petition at 13 n.9. To the contrary, the state constitution provides a ground for decision independent from the federal constitution. On similar facts the SJC has "reached different results under the State Constitution from those that were reached by the Supreme Court . . . under the Federal Constitution." *Commonwealth* v. *Upton*, 394 Mass. 363, 372, 476 N.E.2d 548, 555 (1985). The First Circuit correctly recognized that one area where the Massachusetts constitution sometimes has broader application is freedom of speech. 855 F.2d at 910-11, Pet. A. 41a (citing cases). One marked distinction relevant to this case is that Article 16 — "[t]he right of free speech shall not be abridged" — is not limited to protection against state action. *Compare Batchelder* v. *Allied Stores Int'l, Inc.*, 388 Mass. 83, 445 N.E.2d 590 (1983) (suggesting that Article 16, unlike the First Amendment, would protect free speech at private shopping mall) *with PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980) (First Amendment provides no such protection).

claim without any requirement of state action. Mass. Gen. L. ch. 12, § 11H. Similarly, the court below acknowledged that "there are not any federal cases directly, or even closely, on point in such a *strange fact situation* and with such an *unusual state statute*." 855 F.2d at 911, Pet. A. 42a (emphasis added). Nothing suggests that this is now an issue of nationwide impact, and everything suggests that by deciding the First Amendment issue the Court might risk giving an entirely advisory opinion. In short, "[n]o reason for hasty decision of the constitutional question presented by this case has been advanced." *City of Mesquite*, 455 U.S. at 294.[11]

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO REVIEW THE FIRST CIRCUIT'S READING OF MASSACHUSETTS LAW

This Court should not exercise its certiorari power to review a decision based on state law. The First Circuit held that petitioner's MCRA claim failed on three distinct state law grounds. The Supreme Court should adhere to its general practice of deferring to such readings of state law, both to conserve its own resources and because the lower federal courts are better situated to interpret the local law of their respective circuits.

"[S]tanding alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review." *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983). This Court no longer even lists alleged

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[11] Petitioner tags on to her petition the argument that the court below violated "her basic due process right" because it supposedly did not "apply the applicable law to the facts" after construing the SJC's answers to the certified questions. Petition at 24. Petitioner cites not a single case to explain what this "due process" claim is about. In any event, the First Circuit carefully considered the factual findings below in reaching its decision. *See, e.g.*, 855 F.2d at 901-02, Pet. A. 24a (section of opinion entitled "The Findings Below").

misreadings of state law by Courts of Appeals as a consideration governing review on certiorari. *Compare* Sup. Ct. R. 17 *with* former Sup. Ct. R. 19(1)(b), 398 U.S. 1011, 1030-31 (1970).

Even in cases otherwise presenting an issue worthy of review, the Court has deferred to lower federal court interpretations of state law. Such determinations will not be set aside "except on a plain showing of error," *Palmer* v. *Hoffman*, 318 U.S. 109, 118 (1943), where the Court of Appeals is "clearly wrong," *The Tungus* v. *Skovgaard*, 358 U.S. 588, 596 (1959), and its conclusion is "unreasonable." *Propper* v. *Clark*, 337 U.S. 472, 486-87 (1949). Here *petitioner herself* conceded below that the First Circuit's reading of state law was "*bona fide* and reasonable," based on judgments "upon which reasonable persons may differ" regarding the meaning of the SJC's opinion on the MCRA. *See* Motion of Plaintiffs-Appellants For Rehearing and For [A Second] Certification of Issues to the Massachusetts Supreme Judicial Court at 2, 3. There is thus no call for further review by this Court.

Moreover, the Court may properly defer to the First Circuit as the tribunal more experienced in interpreting both the MCRA and Massachusetts law in general. This Court has often recognized that the courts of appeals, which "deal regularly with questions of state law" in their respective circuits, "are in a better position than we to determine how local courts would dispose of comparable issues." *Butner* v. *United States*, 440 U.S. 48, 58 (1979). The Court is therefore rightly "hesitant to overrule decisions by federal courts skilled in the law of particular states." *Propper*, 337 U.S. at 486.

Here the state law at issue — Massachusetts law — is by definition within the First Circuit's ken. Moreover, the First Circuit has dealt repeatedly with the MCRA.[12] The First Cir-

[12] *See, e.g., Jackson* v. *Liquid Carbonic Corp.*, No. 87-2073, slip op. (1st Cir. Dec. 1, 1988) [available at 1988 U.S. App. LEXIS 16115]; *Domegan* v.

cuit's familiarity with the state law at issue thus confirms the wisdom of deferring to its reading of state law. There is no reason why this Court should venture interpretations of Massachusetts law in a case that presents no other issues.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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Fair, 859 F.2d 1059 (1st Cir. 1988); *Conway* v. *Electro Switch Corp.*, 825 F.2d 593 (1st Cir. 1987); *Elwood* v. *Pina*, 815 F.2d 173 (1st Cir. 1987); *Grubba* v. *Bay State Abrasives, Div. of Dresser Indus., Inc.*, 803 F.2d 746 (1st Cir. 1986); *Doty* v. *Sewall*, 784 F.2d 1 (1st Cir. 1986); *Davis* v. *Sears, Roebuck and Co.*, 708 F.2d 862 (1st Cir. 1983); *Sutter* v. *Pitts*, 639 F.2d 842 (1st Cir. 1981). Indeed, to respondent's knowledge the First Circuit is the only Court of Appeals that has dealt with the MCRA at all.